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CIRCUIT COURT
DANE COUNTY, WI
2025CV002252

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 17

DANE COUNTY

WISCONSIN BUSINESS LEADERS FOR
DEMOCRACY; JOHN A. SCOTT;
NICHOLAS G. BAKER; BEVERLY JOHANSEN;
RACHEL IDA BUFF; KIMBERLY SUHR;
SARAH LLOYD; NANCY STENCIL; VIKAS VERMA;
and JAMES T. LYERLY,

*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.

Case No. 2025CV002252

Three-Judge Panel
Wis. Stat. §751.035

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

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REPLY

Plaintiffs cannot explain away what they correctly told the Wisconsin Supreme Court last summer. That court “imposed the current congressional map,” and so “only th[at] Court has the authority to enjoin that map or otherwise alter the order that requires” the Wisconsin Elections Commission “to hold elections under the map.” Mot. to Intervene by Wis. Bus. Leaders for Democracy et al. ¶16, *Bothfeld v. Wis. Elections Comm’n*, No. 2025AP996-OA (Wis. June 5, 2025). Plaintiffs were right then. Their complaint should be dismissed on that ground alone.

I. The *Johnson II* injunction is final and binding.

Plaintiffs’ response elides that this is no ordinary litigation. Plaintiffs do not challenge legislation as unconstitutional. They challenge a supreme court decision as unconstitutional. In their words, this Court should “hold that a remedy the supreme court put in place four years ago” in *Johnson II* violates “constitutional rights.” Opp.32. That extraordinary request to override the Wisconsin Supreme Court’s final and binding injunction is not reducible to a simple “preclusion” problem or one about “supervisory authority.” Opp.25, 29. As Plaintiffs acknowledge, Opp.25, there is no authority for this Court to entertain their extraordinary request to “[d]eclare” the *Johnson II* districts “invalid” and “enjoin” that Wisconsin Supreme Court injunction. Am.Compl. p. 31.

Despite all that, Plaintiffs contend they are not asking “this Court to ‘overrule, modify or withdraw language’ from *Johnson II*.” Opp.32 (quoting *Cook v. Cook*, 208 Wis.

2d 166, 189, 560 N.W.2d 246 (1997)). But that is precisely what this Court would have to do, lest the Wisconsin Elections Commission be saddled with conflicting injunctions and Wisconsinites sorted into conflicting congressional redistricting plans. The Wisconsin Supreme Court already told the Wisconsin Elections Commission what congressional districts to use after finding they complied with all relevant state and federal laws. *Johnson v. Wis. Elections Comm’n (Johnson II)*, 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402. Any change requires overruling, modifying, and withdrawing language from that final order. *But see Cook*, 208 Wis. 2d at 189. Plaintiffs offer no analogous authority for that extraordinary plea. There is none. It would be “patently erroneous and usurpative.” *State v. Grawien*, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985).

Plaintiffs’ fallback depends on the word “a” in *Johnson II*. They contend that the Supreme Court said its injunction need only remain in effect “until ... *a court* otherwise directs.” Opp.36 (quoting *Johnson II*, 2022 WI 14, ¶52). Plaintiffs “read too much into too little,” parsing that judicial opinion as though it were a statute. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023). Even reading that language as if it were a statute, “*a court*” does not mean “any court.” The reference to “a court” was broad enough to encompass the U.S. Supreme Court’s summary reversal after *Johnson II* for the statehouse districts. *Wis. Legis. v. Wis. Elections Comm’n*, 595 U.S. 398 (2022). And after the 2030 census, it would be broad enough to encompass litigation after that census “renders the current plan unusable.” *Perry v. Perez*, 565 U.S. 388, 392 (2012). Beyond that, the word “a”

does not override the rule this Court cannot “overrule, modify or withdraw” the *Johnson II* injunction. *Cook*, 208 Wis. 2d at 189.

Nor do Wis. Stat. §§801.50(4m) and 751.035(1) *require* this Court to adjudicate the merits of Plaintiffs’ claims. *Contra* Opp.34. This Court is under no more obligation to reach the merits of Plaintiffs’ claims than any other claim foreclosed by precedent. *See, e.g., Levin v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2003 WI App 181, ¶18, 266 Wis. 2d 481, 668 N.W.2d 779 (affirming dismissal of precluded claim and finding plaintiff’s theory “contrary to well-established precedent”). These jurisdiction-creating statutes simply leave it to this Court to dismiss in the first instance Plaintiffs’ “rather extraordinary plea” to revisit *Johnson II*. *Bus. Leaders for Democracy v. Wis. Elections Comm’n*, 2025 WI 52, 418 Wis. 2d 515, 526 27 N.W.3d 522 (Hagedorn, J., concurring).

II. Laches bars Plaintiffs’ claims.

Every laches factor is met here. Plaintiffs’ suit came fourteen years after the enactment of the 2011 congressional plan, nearly four years after *Johnson* began with an invitation for interested parties to move to intervene, and more than three years after *Johnson II* decided the 2022 congressional districts. *See* Legis. Mot. to Dismiss 11-12.

A. Plaintiffs’ unjustified delay satisfies the first laches prong. *See Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶17, 393 Wis. 2d 308, 946 N.W.2d 101. Redistricting cases are no exception to the rule that plaintiffs must “promptly bring a claim.” *Id.* ¶11. While the Wisconsin Supreme Court rejected a laches defense in follow-on redistricting

litigation regarding the statehouse districts, *see Clarke v. Wis. Elections Comm’n*, 2023 WI 79, ¶¶43-44, 410 Wis. 2d 1, 998 N.W.2d 370, Plaintiffs let another two years pass before filing this challenge to the congressional districts. Worse, Plaintiffs alleged harm began in **2011**. *See, e.g., Am.Compl.* ¶81. There is no adequate explanation for their decade-plus delay. No cited case is analogous. Laches was not raised in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). And other cited cases involved challenges just before or just after redistricting. *See, e.g., Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 846-47 (E.D. Wis. 2012); *LULAC v. Perry*, 548 U.S. 399, 413 (2006).

Plaintiffs’ suit is an outlier. Redistricting challenges, such as the *Johnson* original action, are litigated well *before* the next census given the “expiration” of districts once that census comes. *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1314 (N.D. Ala. 2019). While Plaintiffs claim their case was not “ripe” until 2025, Opp.65, laches asks when Plaintiffs “knew or should have known” of their claim, *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶21, 389 Wis. 2d 516, 936 N.W.2d 587, not when they were satisfied with the evidence their experts might use.¹ Plaintiffs, moreover, contradict their stated desire to have more time to gather “district-specific data.” Opp.66. As Plaintiffs acknowledge, the “key” evidence in such cases is not district-specific data but instead an “averag[ing] of certain

¹ *Davis v. Bandemer*, 478 U.S. 109 (1986), is not to the contrary. The Supreme Court concluded “one (or possibly two) elections” failed to prove vote dilution as plaintiffs insisted they did, not that plaintiffs sued too soon. *Id.* at 135-42.

statewide races,” using past election data that has long been publicly available. *Id.* at 61-62 (emphasis added). And Plaintiffs assert they have “overwhelming evidence” of anti-competitiveness given the “decade-long lifespan of Act 44.” Am.Compl. ¶¶5-7, 81. There is no evidentiary justification for Plaintiffs’ delay.

For similar reasons, a newly added minor-aged Plaintiff cannot justify their delay. *Contra* Opp.67. A non-minor Plaintiff resided in District 8 when Plaintiffs initially sued — and the suit still came years too late. *See* Compl. ¶32; Am. Compl. ¶32 (acknowledging he previously resided in district).

B. As to the second laches prong, there was no basis for anticipating Plaintiffs’ suit. *Contra* Opp.68. Before filing this action, Plaintiffs and their same counsel told the Wisconsin Supreme Court that because it “imposed the current congressional map in *Johnson II*, only th[at] Court has the authority to enjoin that map or otherwise alter the order that requires Respondents to hold elections under the map.” Mot. to Intervene by Wis. Bus. Leaders for Democracy et al. at Ex.1 ¶16, *Bothfeld v. Wis. Elections Comm’n*, No. 2025AP996-OA (Wis. June 5, 2025). When the Supreme Court denied that request (and two others) to revisit the *Johnson II* injunction, no reasonable observer would have anticipated this follow-on litigation.

C. As to the third laches prong, Plaintiffs’ delayed action poses real and substantial prejudice to voters, constituents, candidates, lawmakers, and election officials regardless of how much time the parties might have to litigate remedies. *See Trump v. Biden*, 2020

WI 91, ¶¶24-28, 394 Wis. 2d 629, 951 N.W.2d 568. This far into the decennial, voters who “have come to know their districts and candidates” will “be confused by [any] change.” *Fouts v. Harris*, 88 F.Supp.2d 1351, 1354 (S.D. Fla.1999); see *Chestnut*, 377 F. Supp. 3d at 1317 (similar). Revisiting districts after they were settled in *Johnson II* creates a “large potential for disruption.” *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990); see *Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (“Limitations on the frequency of reapportionment are justified by the need for stability and continuity” of the “legislative system”). And if Plaintiffs were to prevail, that would trigger a third round of redistricting legislation, now with outdated census data and the 2030 census looming, even though the Legislature already passed legislation in 2021 (vetoed) and then again in 2024 in response to *Clarke* (signed). See *Chestnut*, 377 F. Supp. 3d at 1317 (finding prejudice when lawmakers would be required to “redistrict twice in two years” with “nine-year-old census data”).²

III. Plaintiffs have not stated any claim redressable by a court.

A. The Wisconsin Supreme Court already rejected Plaintiffs’ partisan gerrymandering theories, and that ruling is binding.

Plaintiffs anti-competitive gerrymandering claims are neither justiciable nor cognizable claims. *Contra* Opp.39. The following rule announced in *Johnson I* compels dismissal for those claims: “the partisan makeup of districts does not implicate any

² Any remedial process would begin by offering the Legislature the first opportunity to redistrict. See, e.g., *Clarke*, 2023 WI 79, ¶57.

justiciable or cognizable right.” *Johnson v. Wis. Elections Comm’n (Johnson I)*, 2021 WI 87, ¶8, 399 Wis. 2d 623, 967 N.W.2d 469 (plurality op.); *accord id.* ¶82 n.4 (Hagedorn, J., concurring). Still today, just as in *Johnson*, “[t]he Wisconsin Constitution contains ‘no plausible grant of authority’ to the judiciary to determine whether maps are fair to the major parties.” *Id.* ¶52 (plurality); *accord id.* ¶82 n.4 (Hagedorn, J., concurring).

Plaintiffs have simply put a new label—“anti-competitive”—on otherwise old claims of partisan unfairness. That new label merely identifies a sub-species of claims that no less challenge “the partisan makeup of districts.” *Johnson I*, 2021 WI 87, ¶8. Plaintiffs’ claims are hardly “distinct” from allegations of partisan gerrymandering. *Contra Opp.*44. They simply reflect Plaintiffs’ preferred partisan makeup—a competitive makeup.³

The Wisconsin Supreme Court already rejected Plaintiffs’ reliance on Article I, Sections 1 and 22 as a basis for declaring districts politically unfair. Article I, Section 1 “has nothing to say about partisan gerrymanders.” *Johnson I*, 2021 WI 87, ¶55. Likewise, Article I, Section 22 is not “an open invitation to the judiciary” to “fabricate a legal

³ Not everyone sees it the same way as Plaintiffs. Others have criticized that “making as many districts as possible more competitive” might make a “recipe for disaster for the disadvantaged party.” *Rucho v. Common Cause*, 588 U.S. 684, 706 (2019); *see also* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 650 (2002) (criticizing “competitive districts” because they “may lead both to greater power for the ideologically centrist, median voter, and to almost half of the voters’ being unhappy with their representative”); *Vieth v. Jubelirer*, 541 U.S. 267, 359 (Breyer, J., dissenting) (observing that in a competitive district, a “small shift” could turn “seismic shift,” “virtually wiping out legislative representation of the minority party”).

standard of partisan ‘fairness.’” *Id.* ¶¶62. Contrary to Plaintiffs’ extraordinary claim that these holdings were merely “advisory” and “musing[s],” Opp.43-44, these holdings are binding. Parties in *Johnson* put those constitutional provisions “before the court” and their interpretation was “necessary for its decision.” *Am. Fam. Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175 (1984). Responding to claims that state law imposed partisan fairness requirements, the plurality held “the partisan makeup of districts does not implicate any justiciable or cognizable right” and would thus not be part of remedial proceedings. *Johnson I*, 2021 WI 87, ¶¶2, 7-8 (plurality op.). Justice Hagedorn concurred in the “entirety” of that conclusion. *Id.* ¶82 n.4 (Hagedorn, J., concurring).

As for Plaintiffs’ invocation of Article III for their “right to vote” claim, nothing about the prevailing court-ordered plan from *Johnson II* precludes Plaintiffs from casting their votes in equally populated districts and having those votes count. *See, e.g., Johnson I*, 2021 WI 87, ¶60 (observing citizens remain free to vote “[e]ven after the most severe partisan gerrymanders”). Plaintiffs offer no limiting principle for their gloss on Article III—that the “right to vote” further encompasses “right to vote *in competitive districts*.” If that were so, why not also the “right to vote and win” or the “right to vote whenever one pleases?” *Cf. State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949) (observing that voting is “subject to reasonable regulation by the legislature”).

Likewise, Plaintiffs’ historical discussion ignores *Johnson I* and its rejection of the judiciary as a referee for the partisan makeup of districts. In *State ex rel. Att’y Gen. v.*

Cunningham, 81 Wis. 440, 51 N.W. 724 (1892), districts were challenged as numerically *malapportioned*. *Contra* Opp. 51. Plaintiffs' cited constitutional debates were about crafting single-member statehouse districts for the legislature, as Congress had just mandated for the U.S. House of Representatives. *See* Apportionment Act of 1842, 5 Stat. 491 (mandating single-member districts); *see also* Journal of the Convention to Form a Constitution for the State of Wisconsin 384 (1848) (statement by Lakin observing that if single-member districts were "right" for "electing members of congress," it was "equally" so for "the election of members of the state legislature"). And while Plaintiffs have identified political statements raising political concerns about districts, *e.g.*, Opp.50 (quoting Governor Dreyfus's veto message), such political objections to an inherently political task are not tantamount to a *constitutional* objection springing from a heretofore unknown and unenumerated constitutional right. *See Rucho*, 588 U.S. at 699 (observing inherently political nature of redistricting); *cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 4 (2022) ("[N]ot all history is created equal.").

At bottom, Plaintiffs cannot overcome what the Wisconsin Supreme Court already decided: courtrooms are not the place to challenge the partisan makeup of districts. *Johnson I*, 2021 WI 87, ¶52. Simply relabeling their claim as one about "competitiveness" is no answer to *Johnson I*. Partisanship is not immutable and "may shift from one election to the next." *Id.* ¶56. Nor is partisanship as simple as predicting the fates of the majority parties given Wisconsin's many independents. *See* Marquette Law School Poll (Jan. 21-

28, 2026) <https://perma.cc/46NG-S4NA>. What's "competitive" for them? While Plaintiffs laud the usefulness of computer simulations or past election results, *Johnson I* concluded the Wisconsin Constitution contains no benchmark for what is fair. Because no set of facts can overcome that binding decision, dismissal is warranted. *See Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, ¶15, 316 Wis. 2d 640, 764 N.W.2d 904.

B. What Plaintiffs ask this Court to do is anything but "ordinary."

Plaintiffs are right that "state courts" may "interpret and enforce state law." Opp.78. But such state-court litigation must be consistent with the "ordinary bounds" of judicial review, for state courts do not have "free rein" to redistrict anew as if they were the Legislature. *Moore v. Harper*, 600 U.S. 1 at 34, 36. "The Framers were aware of electoral districting problems" and "settled" on "assigning the issue to the state legislatures." *Rucho*, 588 U.S. at 699. Applied here, *Johnson II* adjusted the congressional districts so that they were equally populated based on new census data but otherwise deferred to the Legislature's policy choices embodied 2011 Act 44. *See Johnson II*, 2022 WI 14, ¶25. The Wisconsin Supreme Court decided those districts "compl[y] with all relevant laws." *Id.* ¶20. And the Wisconsin Supreme Court has since declined repeatedly to revisit them. Legis. Mot. to Dismiss 6. There has been no relevant change in law since then, meaning there is nothing further for this Court to do. For all the foregoing reasons compelling dismissal, Plaintiffs' case would "transgress the ordinary bounds of judicial review." *Moore*, 600 U.S. at 36.

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Respectfully submitted,

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