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SUPREME COURT

No.2026AP1008

In the Supreme Court of Wisconsin

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-APPELLANTS,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE
BOSTELMANN, ANN S. JACOBS, DON MILLIS, ROBERT F.
SPINDELL, JR., CARRIE RIEPL, MARK L. THOMSEN *and*
MEAGAN WOLFE,
DEFENDANTS-RESPONDENTS,

BILLIE JOHNSON, CHRIS GOEBEL, AARON GUENTHER,
CHARLES HANNA, TIM HIGGINS, LOU KOWIESKI, CHRIS
MULLER, ERIC O'KEEFE, CRAIG ROSAND, RUTH STRECK,
RONALD ZAHN, GLENN GROTHMAN, BRYAN STEIL, TOM
TIFFANY, SCOTT FITZGERALD, DERRICK VAN ORDEN,
TONY WIED, GREGORY HUTCHESON, PATRICK KELLER,
PATRICK MCCALVY, MIKE MOELLER *and* WISCONSIN
STATE LEGISLATURE,
INTERVENORS-DEFENDANTS-RESPONDENTS.

On Appeal From The Dane County Circuit Court,
The Honorable David Conway, the Honorable
Michael Moran, and the Honorable Patricia
Baker, Presiding
Case No.2025CV2975

**RESPONSE BRIEF OF INTERVENORS-DEFENDANTS-
RESPONDENTS 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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ISSUES PRESENTED

1. Whether this Court should order dismissal because the only constitutional methods for seeking relief from this Court's judgment in *Johnson v. Wisconsin Elections Commission* ("WEC"), 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"), are a motion for rehearing or an original-action petition.

The Panel did not address this issue.

2. Whether Plaintiffs' "anti-competitive gerrymandering" theory fails as a matter of law.

The Panel answered "yes."

3. Whether the Wisconsin State Courts striking down the congressional redistricting map that this Court adopted for the State under a least-change approach in *Johnson II* would violate the U.S. Constitution's Elections Clause.

The Panel did not address this issue.

4. Whether the doctrine of laches bars Plaintiffs from obtaining any relief in this case.

The Panel did not address this issue.

INTRODUCTION

In this case, Plaintiffs asked a lower court to throw out a congressional map that this Court adopted after concluding it “compl[ie]d with all relevant state and federal laws.” *Johnson II*, 2022 WI 14, ¶ 25. When this lawsuit was last before this Court on Plaintiffs’ request that this Court appoint a three-judge panel under Wis. Stat. § 751.035, the Congressmen and Individual Voters¹ argued that this Court should dismiss this lawsuit outright because no inferior court could constitutionally grant Plaintiffs relief from this Court’s judgment. But this Court did not resolve that constitutional question, instead accepting Plaintiffs’ argument that this Court’s role at that stage was merely to follow Section 751.035’s directive that this Court “shall appoint a panel consisting of 3 circuit court judges to hear the matter.” This case is now back before this Court after the Panel dismissed Plaintiffs’ lawsuit on the merits, but this Court need not reach those merits if it properly concludes that a lawsuit in a lower court seeking to vacate a judgment issued by this Court is a constitutional nonstarter. That disposition would reaffirm the principle of judicial hierarchy in this State, while leaving the merits of Plaintiffs’ legal theories for another day.

If this Court nevertheless reaches the merits of Plaintiffs’ lawsuit, it should follow the Panel’s approach and hold that *Johnson v. WEC*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469

¹ The Congressmen and Individual Voters are 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.

(“*Johnson I*”), forecloses Plaintiffs’ “anti-competitive gerrymandering” claims for the same reason that *Johnson I* held that partisan-gerrymandering claims raise nonjusticiable political questions. Plaintiffs did not ask this Court to overturn *Johnson I*, and this Court’s case law makes clear that this Court will not *sua sponte* overturn its own precedent. But even if this Court overlooks *Johnson I*, it should still reject Plaintiffs’ theory because it has no basis in our State’s Constitution or history, or in this Court’s precedent. Plaintiffs’ theory is, if anything, even more problematic than a partisan-gerrymandering claim because it is well-recognized that maximizing competitiveness would undermine other important redistricting values like stability and incumbency—and nothing in our Constitution guides courts on how to strike this delicate balance.

Plaintiffs’ lawsuit also asks this Court to violate the U.S. Constitution’s Elections Clause. Adopting Plaintiffs’ audacious theory would set up a high-stakes clash before the U.S. Supreme Court as to the outer boundaries of state courts’ authority to redraw congressional maps after *Moore v. Harper*, 600 U.S. 1 (2023). The Congressmen and Individual Voters respectfully submit that it is hard to imagine a case better designed to stir the U.S. Supreme Court into action in this area than one where state courts throw out a congressional map drawn to adhere to the political judgment “prescribed [] by the Legislature,” U.S. Const. art. I, § 4, under the guise of a novel “anti-competitive gerrymandering” theory with no basis in the State’s constitutional text, history, or case law.

This Court should affirm the judgment of the Panel.

ORAL ARGUMENT AND PUBLICATION

By “decid[ing] that this appeal will be heard,” App.617, this Court has indicated that this case is appropriate for publication. This Court set oral argument for September 16, 2026.

STATEMENT

A. Wisconsin’s 1848 Constitution And Its Provision For Congressional Districting

In the 1840s, population growth in the Wisconsin Territory prompted Congress to authorize the People “to form a constitution and State government, for the purpose of being admitted into the Union.” Ch. 89, 9 Stat. 56, 56 (1846). Congress further provided that, once Wisconsin attained statehood, it would “be entitled to two representatives in [] Congress.” *Id.* at 58.

At the first constitutional convention that followed, the delegates resolved to draw Wisconsin’s initial congressional districts into the proposed constitution, consisting of whole counties. *See Journal Of The [First] Convention To Form A Constitution For The State Of Wisconsin* at 341, 344, 434–38, 455 (1847).² The delegates then determined that the Legislature would draw all subsequent maps after “enumeration and apportionment.” *See id.* at 83–84, 344. The People rejected the convention’s proposed constitution in April 1847. Wis. Legislative

² Available at https://books.google.com/books?id=SI41AQAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (all websites last visited August 6, 2026).

Reference Bureau (“LRB”), *Redistricting In Wisconsin 2020* 38 (2020).³

The People quickly convened a second convention. Like the first convention, the second convention drew the State’s first congressional map into the proposed constitution, consisting of whole counties only. *See Journal Of The [Second] Convention To Form A Constitution For The State Of Wisconsin* at 553, 564–68, 620 (1848)⁴ (hereinafter “Journal”) (debate on “No. 22”). The only notable objection to this congressional map was led by Delegate John H. Rountree, who unsuccessfully opposed the map because he claimed it was a partisan gerrymander. *See id.* at 564–68. Delegate Rountree had proposed his own map that divided the State “into congressional districts by a north and south line.” *Id.* at 564. The convention rejected Delegate Rountree’s proposal and adopted its initially proposed map as Article XIV, Section 10. *Id.* at 620; *see id.* at 568. The Framers further provided in Article XIV, Section 10 that this map would govern “until otherwise provided by law,” and no other provision of the convention’s proposed constitution specifically addressed congressional redistricting. *See generally id.* at 601–27.

The second convention also addressed legislative districting. *See Journal* at 117 (report of committee), 605–06 (adopted text, as Wis. Const. art. IV, §§ 3–5); *see also, e.g., id.* at 218–20, 379–90. Significant debate arose over whether the Framers or the first

³ Available at <https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll2/id/1942/rec/1>.

⁴ Available at <https://ia800507.us.archive.org/4/items/esrp962424900/0001.001.pdf>.

Legislature should draw the initial map and whether county delegations should be empowered to veto their counties' proposed divisions. *See Journal* at 218–20, 379–90. Delegate Charles Dunn believed, for example, the convention drawing lines “would open a door for *ger[r]ymandering*,” and supported greater county delegation involvement. *Id.*; *see also id.* at 382–83. Others disagreed, viewing a greater role for county delegations as “a trap sprung upon [the convention] for political purposes.” *Id.* at 385; *see also id.* at 383–84. Ultimately, the Framers drew the first legislative districts and rejected the county-delegation-veto proposal. *Id.* at 385–86, 526–30. The Framers also adopted specific requirements for the Legislature's later drawing of legislative districts, *see, e.g., id.* at 220, 605, which should occur every five years “according to the number of inhabitants,” *id.* at 605 (articulating exclusions).

The Framers adopted the proposed Constitution, *id.* at 598–99, 620, and the People approved it, Ray A. Brown, *The Making of the Wisconsin Constitution, Part II*, 1952 Wis. L. Rev. 23, 62 (1952). On May 29, 1848, Congress accepted the Wisconsin Constitution and admitted Wisconsin to the Union. Ch. 50, 9 Stat. 233 (1848).

B. Wisconsin's Congressional Map From Statehood Until *Johnson II*

The Legislature first redrew Wisconsin's congressional map about four months after ratification, as Congress provided Wisconsin with a third U.S. House seat for 1849. *See* Ch. 50, 9 Stat. 233, 235 (1848); LRB, *Redistricting In Wisconsin 2020*, *supra*, at 46. That new map divided the State into three districts, each

composed of whole counties, 1848 Wis. Act 11,⁵ with the Legislature creating the third district largely out of the eastern portion of the second, *compare* Wis. Const. art. XIV, § 10 (repealed 1982), *with* 1848 Wis. Act 11. This map governed “for the rest of the 1850s.” LRB, *Redistricting In Wisconsin 2020, supra*, at 46.

“Over the next six redistricting cycles”—from 1860 until 1910—Wisconsin “gradually” received “more congressional representatives” and the Legislature regularly enacted new maps. LRB, *Redistricting In Wisconsin 2020, supra*, at 47. During this time, there were “frequent[] complain[ts]” of political gerrymandering of the State’s congressional map. Alexander McDonald Thomson, *A Political History of Wisconsin* 244 (1900).⁶ For example, in 1868, the Legislature was accused of enacting a partisan “gerrymander” that allowed Republicans to win five of the State’s six seats in the U.S. House with 108,000 votes, compared to the Democrats’ “nearly 85,000” votes. *See A Horrible Democratic Plot*, *Daily Milwaukee News*, March 17, 1869;⁷ *Wisconsin, Waukesha Plaindealer* (Nov. 26, 1867).⁸ And in 1890, a speaker at the Democratic State Convention decried the State’s nine-district map as a Republican gerrymander. Thomson, *supra*, at 244. Under that map, 176,000 Republican voters “have seven

⁵ Available at https://docs.legis.wisconsin.gov/1848/related/acts/48act_p15_16.pdf.

⁶ Available at <https://archive.org/details/politicalhistory00thom/page/n1/mode/2up>.

⁷ Available at <https://www.newspapers.com/image/1299055615/> (subscription required).

⁸ Available at <https://www.newspapers.com/image/1067315746/> (subscription required).

representatives in Congress, while the 155,000” Democratic voters “have only two members.” *Id.*

During this same period, there were also allegations that Democrats engaged in partisan-gerrymandering efforts. In 1890, Democrats had won both Houses of the Legislature and the Governorship. Michael Keane, LRB, *Redistricting In Wisconsin* 7 (Apr. 1, 2016).⁹ The new Democratic majority then drew a legislative-district map that allegedly “disregard[ed] geography in the make-up of the districts” and paid “little attention . . . to population.” Thomson, *supra*, at 245; Keane, *supra*, at 7; LRB, *Redistricting In Wisconsin 2020*, *supra*, at 40; Chapter 482, Laws of 1891. “Republicans sued,” LRB, *Redistricting In Wisconsin 2020*, *supra*, at 40, alleging not partisan gerrymandering, but that the map violated our Constitution’s textual requirements for state-legislative-district maps, such as population equality and adherence to county or municipal lines, *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 725 (1892). As discussed below, *infra* pp.45–47, this Court agreed and declared the map “void,” *Cunningham*, 51 N.W. at 730.

Wisconsin entered its modern era of decennial congressional redistricting after *Wesberry v. Sanders*, 376 U.S. 1 (1964), held that the U.S. Constitution mandated equally populous congressional districts, *see* LRB, *Redistricting In Wisconsin 2020*, *supra*, at 47–73. In 1972, the Legislature passed a nine-district congressional map. *Id.* at 55–56 (citing Chapter 133, Laws of 1971). During the

⁹ Available at <https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll2/id/2039/rec/12>.

1980 cycle, Governor Lee Dreyfus vetoed the Legislature’s initial proposal as an “accommodation among both Republican and Democrat political forces” that split too many county and municipal lines. Assemb. J., 85th Reg. Sess., at 1780–81 (Wis. Dec. 2, 1981);¹⁰ Keane, *supra*, at 13. The Legislature then passed a replacement plan, which Governor Dreyfus signed in March 1982. 1981 Wis. Act 154; 1981 Wis. Act 155. For the 1990 cycle, the Legislature again passed a nine-district map. 1991 Wis. Act 256. And for the 2000 cycle, the Legislature passed a new map after the 2000 census reduced Wisconsin to eight Representatives. 2001 Wis. Act 46.

In 2011, the Legislature again drew an eight-district congressional map. 2011 Wis. Act 44. Some plaintiffs challenged that map, as well as the 2011 legislative maps, in *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012), including on partisan-gerrymandering grounds. *Baldus* dismissed the partisan-gerrymandering claim for lack of judicially manageable standards, *see id.* at 853–54, while noting that the 2011 congressional map was the product of a “bipartisan process,” where the map’s Republican drafters had “consulted” with their “Democratic colleagues to discuss their preferences” and worked to “incorporate all of the feedback (not just the Republican comments) into” the map, *id.* at 854. Later, other plaintiffs again challenged the 2011 legislative maps on partisan-gerrymandering grounds, but they

¹⁰ Available at <https://docs.legis.wisconsin.gov/1981/related/journals/assembly/19811202.pdf>.

opted not to bring a similar challenge to the 2011 congressional map. *See Gill v. Whitford*, 585 U.S. 48, 52–60 (2018).

C. This Court’s Adoption Of Wisconsin’s Current Congressional Map In *Johnson II*

After the 2020 census, the Legislature and the Governor failed to agree on a map, and this Court undertook the “unwelcome task” of “redraw[ing]” the congressional district “boundaries” itself, in its original jurisdiction. *Johnson II*, 2022 WI 14, ¶¶ 1–2. This Court ultimately adopted the congressional map that Governor Evers had proposed in *Johnson II*, after concluding that it “compl[ies] with all relevant state and federal laws.” *Id.* ¶ 25.

As part of its redistricting process, this Court in *Johnson I* defined the legal standards applicable to the adoption of a new map. 2021 WI 87, ¶¶ 24–63. *Johnson I* articulated the federal and state-law requirements for congressional redistricting—such as the one-person, one-vote principle, *id.* ¶¶ 24–38—while also recognizing that the U.S. Constitution’s Elections Clause provides the Legislature with broad “discretion to decide how congressional elections are conducted,” *id.* ¶ 12 (citing U.S. Const. art. I, § 4).

Johnson I then considered whether “the partisan makeup of districts [was] a valid factor for [the Court] to consider” and held that it was not. *Id.* ¶¶ 7, 39–63. Partisan-gerrymandering claims ask “[w]hether a map is ‘fair’ to the two major political parties,” but there are no “judicially manageable standards” to “determine the fairness of the partisan makeup of districts” in our Constitution. *Id.* ¶¶ 39–40. Such claims could lead to “a ‘bipartisan’ gerrymander to ensure” that a map obtains “the ‘right’ outcome,” which would conflict with many constitutional

“mandate[s].” *Id.* ¶ 48. While this Court “searched in earnest” for “a right to partisan fairness” in Article I, Section 1 and Article I, Section 22—among other places—it “conclude[d] [that] the right does not exist” in those provisions. *Id.* ¶ 53. “Article IV, Sections 3, 4, and 5” provide “the only Wisconsin constitutional limits [the Court has] ever recognized on the legislature’s discretion to redistrict,” and they impose only “discrete requirements” unrelated to partisan gerrymandering. *Id.* ¶ 63. Without constitutional standards to apply, the question of partisan fairness is “purely political,” *id.* ¶ 39, and thus “non-justiciab[le],” *id.* ¶ 51.

Next, *Johnson I* adopted a “least-change approach” for the Court to employ in selecting remedial maps. *Id.* ¶ 72 (plurality op.); *id.* ¶ 82 n.4 (Hagedorn, J., concurring). Under that approach, the Court “us[ed] the existing maps,” *id.* ¶ 72 (plurality op.)—the 2011 congressional map “adopted by the legislature” and “signed by the governor,” *id.* ¶ 64 (majority op.)—“as a template” for the new map “and implement[ed] only those remedies necessary to resolve constitutional or statutory deficiencies,” *id.* ¶ 72 (plurality op.) (citation omitted); *id.* ¶ 82 (Hagedorn, J., concurring).

Ultimately, this Court held in *Johnson II* that the Governor’s proposed map “ma[d]e the least changes from existing congressional district boundaries [drawn in 2011] while complying with all relevant state and federal laws.” 2022 WI 14, ¶ 25. This Court adopted that congressional map and ordered WEC to use it “for all upcoming elections.” *Id.* ¶ 52. The Congressmen moved for reconsideration of *Johnson II*, which this Court denied. Order at 1, *Johnson*, No. 2021AP1450-OA (Apr. 15, 2022).

D. Plaintiffs Challenge The *Johnson II* Map

1. Plaintiffs initiated this lawsuit in July 2025, challenging the *Johnson II* map as an “anti-competitive gerrymander.” See App.32–34. Plaintiffs allege that the “2011 congressional map” “intentionally made districts less competitive.” App.65. Plaintiffs then allege that this Court’s use of the least-change approach to adopt the *Johnson II* map “perpetuated” the 2011 map’s anti-competitiveness. App.67. Notably, Plaintiffs previously attempted to raise these same “anti-competitive gerrymander” claims with this Court when lead-Plaintiff WBLD and others sought to intervene in an original-action petition challenging the *Johnson II* map. App.209–46. This Court denied that petition on June 25, 2025. See R.44:449–50 (Exhibit 30).

2. Contemporaneously with the filing of their Complaint, Plaintiffs requested that the Circuit Court Clerk transmit the Complaint to this Court for the appointment of a three-judge panel under Wis. Stat. § 801.50(4m). R.11. Upon receipt, this Court opened a miscellaneous docket to consider Plaintiffs’ request, while also accepting briefing from various parties. R.39:1. The Congressmen and Individual Voters intervened and opposed Plaintiffs’ request. R.44:489–517 (Exhibit 37).¹¹ They explained that this Court appointing a panel would be futile because Plaintiffs had challenged this Court’s judgment in *Johnson II*, but no lower court has the power to overrule this Court’s judgments. R.44:511–15 (Exhibit 37). Plaintiffs, on the other hand, claimed

¹¹ The Congressmen and Individual Voters also unsuccessfully moved to recuse Justices Protasiewicz and Crawford. R.37, R.38.

that this Court appointing the panel was a mandatory, ministerial duty and that questions regarding the panel's authority should be addressed later. Pls.' Br. Addressing Applicability of Wis. Stat. § 801.50(4m) at 17–25, *WBLD v. WEC*, No.2025XX1330 (Wis. Oct. 9, 2025).

On November 25, 2025, this Court appointed a three-judge panel of the Circuit Court under Sections 801.50(4m) and 751.035, while selecting Dane County as the venue. R.39:4–5. In entering that order, the Court explained that these provisions “required” the Court “to appoint a three-judge panel.” R.39:4. Writing separately, Justice Hagedorn emphasized that whether Plaintiffs could obtain their requested relief was not before the Court “at this stage,” while also flagging the significant “legal roadblocks” that would need to be “reckoned with” before the Panel could grant the “extraordinary” relief of declaring an “order of this court unconstitutional.” R.39:6–7 (Hagedorn, J., concurring).

3. Now before the Panel, the Congressmen and Individual Voters moved to dismiss Plaintiffs' Complaint. R.193. First, the Panel could not constitutionally grant Plaintiffs any relief because they were challenging this Court's final judgment adopting the *Johnson II* map and the Panel is an inferior tribunal. R.193:6–12. Second, Plaintiffs' “anti-competitive gerrymandering” claims raise only nonjusticiable political questions, including under *Johnson I*'s reasoning. R.193:12–21. Third, granting Plaintiffs' relief would violate the U.S. Constitution's Elections Clause. R.193:21–28. Finally, laches barred Plaintiffs' claims. R.193:28–29.

The Panel granted the Motion To Dismiss in full, App.599–611, along with similar motions filed by the Legislature and the *Johnson* Intervenors, R.187; R.191, based on two interrelated holdings. First, Plaintiffs’ “anti-competitive gerrymandering” claims were nonjusticiable under *Johnson I*, App.606–09, as they “are functionally equivalent to [the] partisan gerrymandering claims” rejected there, App.607–08. Second, and relatedly, *Johnson I* “effectively foreclosed” Plaintiffs’ reliance on Article I, Sections 1 and 22, and Article III, Section 1 as support for their claims, App.609–10, by holding that Article IV “contains the exclusive repository of state constitutional limits on redistricting,” App.611 (citations omitted).

STANDARD OF REVIEW

The Court reviews “de novo” “a lower court’s decision to grant or deny a motion to dismiss.” *Wis. Mfrs. & Com. v. Evers*, 2022 WI 38, ¶ 7, 401 Wis. 2d 699, 977 N.W.2d 374. A court must grant a motion to dismiss where a complaint “[f]ail[s] to state a claim upon which relief can be granted,” Wis. Stat. § 802.06(2)(a)(6), or where the court is without “power” to “decide” the case, *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738 (citation omitted); Wis. Stat. § 802.06(2)(a)(2). This Court also “review[s] de novo” “question[s] of law,” such as a Circuit Court’s interpretation of our Constitution. *Appling v. Walker*, 2014 WI 96, ¶ 17, 358 Wis. 2d 132, 853 N.W.2d 888.

ARGUMENT

I. This Court Should Order This Case Dismissed Because The Only Constitutional Methods For Challenging This Court's Judgment Are A Motion For Rehearing Or An Original-Action Petition

A. Article VII places this Court atop the State's judicial system. Article VII "vest[s]" all of Wisconsin's "judicial power" in a single, "*unified* court system," with "*one* supreme court" at the top. Wis. Const. art. VII, § 2 (emphases added). Article VII then gives this Court "superintending and administrative authority over all courts." *Id.* § 3(1). This language—in particular the terms "*unified* court system," "*one* supreme court," and "authority over *all* courts," *id.* §§ 2–3 (emphases added)—means that, "[b]y the constitution," this Court has all "power to exercise fully and completely the jurisdiction of superintending control over all inferior courts," *State ex rel. Fourth Nat'l Bank of Phila. v. Johnson*, 103 Wis. 591, 79 N.W. 1081, 1091–92 (1899). "[W]hen the framers of the constitution speak of a supreme court, they intended to convey the idea of the highest tribunal in the judicial department of the government." *Att'y Gen. v. Blossom*, 1 Wis. 317, 322 (1853). Thus, "[t]he constitution provides that this [Court] shall be a court of last resort[]—a court whose judgments, so far as they relate to state polity, are final and conclusive." *Ean v. Chi., M. & St. P. Ry. Co.*, 101 Wis. 166, 76 N.W. 329, 330 (1898).

Inferior courts have no constitutional authority to review, let alone reverse, this Court's judgments. *See* Wis. Const. art. VII, § 3(1). That is why this Court has repeatedly explained that all lower courts in this State must follow its judgments, with only this Court having the power to review and overturn those judgments.

See, e.g., Blossom, 1 Wis. at 322; *Ean*, 76 N.W. at 330. Lower courts “ha[ve] no power to vacate or set [] aside” a judgment of this Court, *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418 (citation omitted), or to issue decisions that “conflict with the expressed or implied mandate of [an] appellate court,” *id.* ¶ 32; *Fourth Nat’l Bank*, 79 N.W. at 1091–92.

Gabler v. Crime Victims Rights Board, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384, is instructive. There, this Court considered the claim that the Crime Victims Rights Board (“Board”) had the authority “to take action on” victims’ “complaint[s]” challenging judicial decisions—including decisions issued by this Court. *Id.* ¶ 45. This Court rejected the Board’s assertion of such authority because it would place circuit courts in the “absurd, not to mention unconstitutional, position of reviewing the Wisconsin Supreme Court’s interpretation of the law” if “the members of this [C]ourt . . . initiate[d] a Chapter 227 action” to challenge an action from the Board entered against a decision from this Court. *Id.* That conclusion obtained even though this Court could still have the last word in any such Chapter 227 proceeding on appeal. *See generally id.* ¶ 23.

This Court can review its own judgments via two methods. “A party” to a judgment from this Court “may seek reconsideration” of a “judgment” by filing a motion with this Court “within 20 days after the date of the decision.” Wis. Stat. § (Rule) 809.64. Or a party may file an original-action petition with this Court, *id.* § (Rule) 809.70, seeking to initiate a new case in this Court’s original jurisdiction that challenges a prior judgment, as

happened in *Clarke v. WEC*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370.

B. Here, Plaintiffs brought their challenge to the map that this Court adopted in its *Johnson II* judgment before the Panel of the Circuit Court below—an inferior court of this State—asking the Panel to declare this Court’s *Johnson II* judgment unconstitutional. See App.76. The Panel has “no power to vacate or set [] aside” a judgment from this Court, *Tietsworth*, 2007 WI 97, ¶ 50, under the principles articulated above. The Panel is “an inferior tribunal” both as a constitutional matter and as a statutory matter, so it “has no authority to modify or overrule” this Court’s decisions. App.606; see *Fourth Nat’l Bank*, 79 N.W. at 1092. This Court has “superintending” authority “over all courts,” Wis. Const. art. VII, § 3(1) (emphasis added); *Blossom*, 1 Wis. at 322, which includes a three-judge panel under Sections 801.50(4m) and 751.035(1).

Plaintiffs’ Complaint impermissibly seeks relief from the inferior Panel against this Court’s *Johnson II* judgment, which “adopt[ed]” the State’s “congressional map.” App.49–50. As an inferior court, the Panel has no authority to grant Plaintiffs any of their requested relief. *Supra* pp.24–25. Plaintiffs themselves previously recognized this principle, noting in seeking this Court’s intervention in an original-action posture that “only this Court has the authority to enjoin [the *Johnson II*] map.” App.224. Any challenges to *Johnson II* must come to this Court directly, either in a timely reconsideration motion filed in *Johnson II* itself, Wis. Stat. § (Rule) 809.64, or via an original action, *id.* § (Rule) 809.70.

Various parties—including the Congressmen and Plaintiffs—have already attempted to challenge the *Johnson II* judgment through those methods, but this Court rejected those efforts. *See supra* pp.20–21. Our Constitution does not authorize an inferior Panel to reach a different result. *Supra* pp.24–25.

Neither this Court’s order appointing the Panel, nor this Court taking jurisdiction over this appeal, changes this analysis. This Court’s order concluded only that Sections 801.50(4m) and 751.035 statutorily “require[]” it “to appoint a three-judge panel and designate a circuit court venue” in cases like this, without considering any merits issues. R.40:3–4. Justice Hagedorn recognized this point—without disagreement from the Court—explaining that, at the panel-appointment stage, any merits “issues” were “not yet [this Court’s] to decide.” R.40:6 (Hagedorn, J., concurring in part and dissenting in part). The issue of the Panel’s authority is now ripe, and it provides the proper basis for disposing of this case.

Relatedly, that this case is now on appeal before this Court does not displace these principles. Even if the Court were to find that Plaintiffs’ novel “anti-competitive gerrymandering” claim is justiciable under our Constitution, *but see infra* Part II, it would still be unconstitutional for the Panel to apply this hypothetical holding in a case challenging a map adopted by this Court, for the same reasons discussed above, *see supra* pp.24–25.

II. Plaintiffs’ “Anti-Competitive Gerrymandering” Claims Fail As A Matter Of Law

A. This Court’s Reasoning In *Johnson I* Compels The Conclusion That “Anti-Competitive Gerrymandering” Claims Are Nonjusticiable

In articulating the standards that would govern adoption of a congressional redistricting map, *Johnson I* held that “the partisan makeup of districts” is not “a valid factor for [the Court] to consider.” 2021 WI 87, ¶ 7. The reasons that this Court gave to explain that holding dictate the conclusion that Plaintiffs’ “anti-competitive gerrymandering” claim is nonjusticiable. Given that Plaintiffs do not ask this Court to overturn *Johnson I*, this Court should simply affirm the Panel’s dismissal under *Johnson I*.

1. *Johnson I* held that partisan-gerrymandering claims—which require the Court to ask “[w]hether a map is ‘fair’”—are “quintessentially” “political question[s]” that Wisconsin courts cannot constitutionally “consider.” *Id.* ¶¶ 39–40. This Court reasoned, in part, that “there are no ‘judicially discoverable and manageable standards’ by which to judge partisan fairness,” *id.* ¶ 40, and that “[t]he people have never consented to the Wisconsin judiciary deciding what constitutes a ‘fair’ partisan divide[,] [so] seizing such power would encroach on the constitutional prerogatives of the political branches,” *id.* ¶ 45 (citation omitted).

In reaching that conclusion, this Court assured itself that our Constitution “says nothing about partisan gerrymandering.” *Id.* ¶ 53 (formatting altered). Specifically, “a right to partisan fairness” “does not exist” in either Article I, Section 1, or in Article I, Section 22. *Id.* ¶¶ 53–55, 62. Rather, “the only Wisconsin constitutional limits [the Court has] ever recognized on the

legislature’s discretion to redistrict” are in Article IV, Sections 3–5, and the “discrete requirements” imposed there do not touch upon partisan gerrymandering. *Id.* ¶ 63. There is no “reservoir of additional [redistricting] requirements” outside of Article IV, Sections 3–5. *Id.* Finally, recognizing partisan-gerrymandering claims would force the Legislature to disregard the “traditional redistricting criteria” mandated by the Constitution to draw a map that achieves “the ‘right’” party balance, given that “Democrats tend to live close together in urban areas, whereas Republicans tend to disperse into suburban and rural areas.” *Id.* ¶ 48. While redistricting according to those criteria “may not” create districts that are “politically competitive,” it is nevertheless constitutionally “mandated” as to legislative districts. *Id.*

2. Plaintiffs’ “anti-competitive gerrymandering” claims are “non-justiciab[le]” political questions under *Johnson I*’s reasoning. *Id.* ¶ 51. Plaintiffs asserted three “anti-competitive gerrymandering” claims against the *Johnson II* map. App.71–75. Count I relies on Article I, Section 1’s equal-protection guarantees, App.71–73; Count II is based on Article I, Section 22’s “free government” guarantee, App.73–74; and Count III is brought under Article III’s right-to-vote protections, App.74–75; see App.53. Each claim rests upon the same core allegations: the Legislature drew the 2011 map to “insulate[] each incumbent from electoral competition,” App.65, and this Court’s utilization of *Johnson I*’s least-change approach to adopt the *Johnson II* map “necessarily perpetuated” that “intentional and effective effort to suppress competition,” App.67.

Plaintiffs’ “anti-competitive gerrymandering” theory does not fall within the universe of justiciable redistricting requirements articulated in *Johnson I*. “[T]he *only* Wisconsin constitutional limits” “ever recognized on the legislature’s discretion to redistrict” are in “Article IV, Sections 3, 4, and 5,” meaning there is no “reservoir of additional requirements” in any other provision. *Johnson I*, 2021 WI 87, ¶ 63. But Article IV, Sections 3, 4, and 5 contain no “anti-competitive gerrymandering” prohibition, *see generally* Wis. Const. art. IV, §§ 3–5, just as they contain no partisan-gerrymandering prohibition, *Johnson I*, 2021 WI 87, ¶ 63. That is why Plaintiffs do not invoke those provisions to support their theory. *See* App.71–75.

Because the constitutional provisions Plaintiffs cite for their “anti-competitive gerrymandering” claims, App.71–75, do not impose any competitive-map “requirements” or “limits,” *Johnson I*, 2021 WI 87, ¶ 63, *Johnson I* compels the conclusion that Plaintiffs’ claims are “non-justiciab[le],” *id.* ¶ 51. Counts I and II invoke provisions that *Johnson I* expressly rejected as sources for redistricting limitations. Count I relies on Article I, Section 1, App.71–73, which *Johnson I* explained could not support a partisan-gerrymandering claim because “partisan affiliation” is not a “permanent,” “immutable characteristic” protected by the Constitution, 2021 WI 87, ¶¶ 54–58 (citation omitted). That holding applies to Plaintiffs’ “anti-competitive gerrymandering” claim, as a district’s competitiveness also “shift[s] from one election to the next,” *id.* ¶ 56. As for Count II’s reliance on Article I, Section 22, App.73–74, *Johnson I* held that it does not support partisan-

gerrymandering claims because it supplies no standard for partisan fairness and is not “an open invitation to the judiciary to rewrite duly enacted law,” 2021 WI 87, ¶ 62 (citation omitted)—a holding that extends to “anti-competitive gerrymandering” claims. Count III, which relies upon Article III, similarly fails under *Johnson I*. Nothing in Article III—which contains “[t]he qualifications of an elector entitled to vote,” *LWV of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 18, 357 Wis. 2d 360, 851 N.W.2d 302, *see generally* Wis. Const. art. III, §§ 1–6—includes an “anti-competitive gerrymander” theory, *see Johnson I*, 2021 WI 87, ¶¶ 53–63, as an allegedly anti-competitive map does not interfere with “casting” a “ballot,” *see Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 2, 26–39, 77, 357 Wis. 2d 469, 851 N.W.2d 262.

Finally, *Johnson I* drew a parallel between partisan gerrymandering and considerations of “political[] competitive[ness],” 2021 WI 87, ¶ 48, and that tie further refutes Plaintiffs’ theory. As noted, *Johnson I* recognized that partisan-gerrymandering claims could lead to “‘bipartisan’ gerrymander[s]” of maps to “ensure” that “the ‘right’ [partisan] outcome” is achieved. *Id.* Such “‘bipartisan’ gerrymanders” could result in “districts” that are more “politically competitive” between the parties, as they may ignore constitutional “mandate[s]” like contiguity, compactness, and the like that tend to reduce competition. *Id.* Nevertheless, *Johnson I* concluded that our Constitution does *not* require that competition-maximizing result,

id., further underscoring that the Constitution does not create a judicially enforceable “anti-competitive gerrymandering” claim.

3. Plaintiffs did not ask this Court to overrule *Johnson I*, and because this Court does not *sua sponte* overrule its own cases, *see, e.g., Evers v. Marklein*, 2025 WI 36, ¶ 25, 417 Wis. 2d 453, 22 N.W.3d 789, *Johnson I* is dispositive here. Plaintiffs’ claims that *Johnson I*’s nonjusticiability holding is not controlling all fail.

First, Plaintiffs assert that their “anti-competitive gerrymandering” claims are different from the partisan-gerrymandering claims considered by *Johnson I* and so fall outside of its nonjusticiability holding. Br.22–28. Even accepting Plaintiffs’ premise that “anti-competitive gerrymandering” claims are materially different than partisan-gerrymandering claims, *but see* Br.29–32, 44–47 (Plaintiffs repeatedly citing partisan-gerrymandering cases to support their claims), these claims are still materially identical with respect to *Johnson I*’s nonjusticiability analysis. “[A]nti-competitive gerrymandering” claims rely on an assessment of whether a map *unfairly* favors one candidate (such as an incumbent) over another, Br.45–48, just as partisan-gerrymandering claims rely on an assessment that a map *unfairly* favors one party, *Johnson I*, 2021 WI 87, ¶¶ 40–52. Since *Johnson I* already held that nothing in the Constitution enshrines a justiciable “fairness” principle for redistricting maps—whether it is competitive or partisan fairness—*Johnson I* compels the conclusion that “anti-competitive gerrymandering” claims are nonjusticiable. *Id.* ¶¶ 53–63.

Second, Plaintiffs claim that *Johnson I*'s nonjusticiability holding was dicta, Br.28–30, but that is wrong. *Johnson I*'s conclusion that partisan-gerrymandering claims are nonjusticiable because the Constitution supplies no judicially manageable standards to apply to them is an express holding from a majority of this Court. *see Johnson I*, 2021 WI 87, ¶¶ 40–63; *see also id.* ¶ 8 (plurality op.); *id.* ¶ 82 (Hagedorn, J., concurring) (joining the majority except for ¶¶ 8, 69–72, and 81, and also concurring in the conclusion that the Court “should not consider the partisan makeup of districts”). This conclusion was necessary to *Johnson I*'s judgment, as the Court had to determine whether it must assess the partisan fairness of a proposed map before it could adopt one. *Id.* ¶ 7 (majority op.). This is why *Johnson I* stated: “[w]e hold . . . the partisan makeup of districts does not implicate any justiciable or cognizable right,” 2021 WI 87, ¶ 8 (plurality op.); *id.* ¶ 82 (Hagedorn, J., concurring), in a section titled “Procedural History And Holding,” *id.* ¶ 5 (majority op.) (formatting altered) (emphasis added).

Plaintiffs further claim that *Clarke* determined that *Johnson I*'s nonjusticiability holding was dicta, given that *Clarke* stated that the “extreme-partisan-gerrymandering claim” there “present[ed] an important and unresolved legal question.” Br.29 (citation and emphasis omitted). Plaintiffs overread *Clarke*, as a sentence about a claim that was not accepted for review is not sufficient to overrule what clearly is a prior holding of this Court in *Johnson I*. *See Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶¶ 94–95, 264 Wis. 2d 60, 665 N.W.2d 257 (citations

omitted); *accord* App.608 n.10. Further, *Clarke* considered only state-legislative maps, 2023 WI 79, ¶¶ 2–4, and so did not change *Johnson I*’s requirements as to congressional maps given the Elections Clause implications of judicially changing congressional maps, *see infra* Part III. In any event, even this Court’s dicta is binding until specifically overruled by this Court, *see Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682, and nothing in *Clarke* overruled this aspect of *Johnson I*.

If Plaintiffs wanted the Court to overturn *Johnson I* in any respect, 2021 WI 87, ¶¶ 40–52, they should have made such a request under the applicable stare decisis factors, *see Evers*, 2025 WI 36, ¶ 25; *LeMieux v. Evers*, 2025 WI 12, ¶ 23, 415 Wis. 2d 422, 19 N.W.3d 76; *Wisconsin v. McAdory*, 2025 WI 30, ¶ 16 n.5, 417 Wis. 2d 194, 22 N.W.3d 844. Having failed to do so, their case fails.

B. Even Putting *Johnson I* Aside, The Wisconsin Constitution Contains No Cognizable “Anti-Competitive Gerrymandering” Prohibition

A court may only exercise “[t]he judicial power,” Wis. Const. art. VII, § 2, if a case presents a “controversy” that is “justiciable,” *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶ 37, 244 Wis. 2d 333, 627 N.W.2d 866, including where a claim involves “judicially discoverable and manageable standards” grounded in the Constitution, *In re John Doe Proceeding*, 2004 WI 65, ¶ 27 n.9, 272 Wis. 2d 208, 680 N.W.2d 792 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Whether a court may resolve a constitutional claim with judicially discoverable and manageable standards depends upon an analysis of the Constitution’s text, *see Johnson I*, 2021 WI 87, ¶¶ 44–49, 51–63, our State’s history, *id.* ¶ 50, and this

Court's precedent, *Vincent v. Voight*, 2000 WI 93, ¶ 2 n.2, 236 Wis. 2d 588, 614 N.W.2d 388.

Plaintiffs' novel "anti-competitive gerrymandering" claims raise only nonjusticiable questions. Nothing in our Constitution's text, *infra* Part II.B.1, our State's history, *infra* Part II.B.2, or this Court's precedent, *infra* Part II.B.3, suggests that there are judicially discoverable and manageable standards to adjudicate their "anti-competitive gerrymandering" claims.

1. Nothing In The Constitution's Text Provides Judicially Manageable Standards For Recognizing An "Anti-Competitive Gerrymandering" Claim

a. Our Constitution imposes only two requirements on congressional maps, both under Article I, Section 1: the State may not engage in racial gerrymandering, and it must draw congressional districts with as close to equal population as possible. Wis. Const. art. I, § 1; *see Johnson I*, 2021 WI 87, ¶¶ 25, 28–33. Our Constitution contains no other requirements for congressional redistricting. *See Johnson II*, 2022 WI 14, ¶ 20; *accord* Keane, *supra*, at 19–20.

Because there is no textual basis in our Constitution for "anti-competitive gerrymandering" claims, there are no "judicially discoverable and manageable standards" to guide courts' principled adjudication of such claims. *Johnson I*, 2021 WI 87, ¶ 40 (citations omitted); *see also In re John Doe Proceeding*, 2004 WI 65, ¶ 27 n.9. To decide Plaintiffs' claims, courts would have to decide, among other vexing questions: (i) when a map has become too "anti-competitive," *compare* App.70; (ii) whether (and how much) the analysis changes if a particular election or another is

especially close, *compare* App.68–69; (iii) whether (and how much of) a map’s “anti-competitiveness” is due to the natural comparison of the strengths of the incumbents and the weaknesses of the non-incumbents or to the “artificial suppression of electoral competition,” *compare* App.73; and so on. To be more concrete, the map that Plaintiffs challenge here has two of the most competitive districts in the Nation, according to the widely respected Cook Political Report, as a matter of baseline partisanship, with ratings of R+2 (District 1) and R+3 (District 3). Cook Political Report, 2026 Cook VSI: District Map and List (119th Congress).¹² Is that enough to defeat Plaintiffs’ theory? What if there were three competitive districts, or just one? With no constitutional text as a guide, these are all “purely political question[s]” that our courts have no authority to “consider.” *Johnson I*, 2021 WI 87, ¶ 39.

The absence of constitutional standards is further complicated by disagreement over whether competitiveness is an unqualified good, given its tension with other important values. To provide for closer races, a map must “crack[] ideologically congruent voters into separate districts,” increasing the number of voters who are unhappy with their district’s election results. Thomas L. Brunell, *Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes toward Congress*, *PS: Pol. Sci. & Pol.*, Jan. 2006, at 77. Conversely, a map that keeps ideologically congruent voters together ensures that most voters

¹² Available at <https://www.cookpolitical.com/cook-pvi/2026-partisan-voting-index/district-map-and-list>.

are satisfied with their representative, which is a democratic value itself. Justin Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 J. Theoretical Politics 431, 432, 450 (2005). Further, creating a competitive map could undermine the benefits of incumbent representation, which courts—including the U.S. Supreme Court—consider a “legitimate objective[]” in redistricting. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); see also, e.g., *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 259 (2015); *White v. Weiser*, 412 U.S. 783, 791 (1973). Incumbency encourages accountability and extant relationships with voters. Nathaniel Persily, *In Defense of Foxes Guarding the Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 670–71 (2002). And States and their citizens have “a truly compelling interest” in reelecting “senior” representatives because “[p]ower in [Congress]” is largely based on “seniority.” *Id.* Without any constitutional standards to apply, the courts are not free to decide whether the benefits of competition outweigh all these competing values.

b. Plaintiffs identify three constitutional provisions that allegedly support their “anti-competitive gerrymandering” claims—Article I, Section 1; Article I, Section 22, and Article III. Br.32–36; App.71–75. But none of those provisions enshrines a judicially enforceable right against “anti-competitive gerrymandering.” Article I, Section 1 protects “immutable” characteristics, but competitiveness may “shift from one election to the next.” *Johnson I*, 2021 WI 87, ¶ 56 (citation omitted).

Article I, Section 22, mandates “moderation” and “temperance,” which does not support “fabricat[ing] a legal standard of [competitive] ‘fairness.’” *Id.* ¶ 62. And Article III says nothing about “anti-competitive gerrymandering.” *See Milwaukee Branch*, 2014 WI 98, ¶¶ 2, 26–39.

Plaintiffs also argue that Article IV cannot be the “sole repository” of redistricting “limits,” contrary to *Johnson I*, because *Clarke* “endorsed remedial principles drawn from neither federal law nor Article IV” when preparing to adopt a remedial legislative map there, like “partisan impact”. Br.30–31 (citations omitted). But *Clarke* adopted those principles as part of the Court’s power to adopt “remedial legislative maps,” 2023 WI 79, ¶ 64, not as “constitutionally mandated criteria,” *id.* ¶¶ 68–69. Thus, *Clarke*’s approval of certain “remedial principles” in the context of judicially adopted redistricting of legislative maps says nothing about what our Constitution *requires* for congressional maps.

Plaintiffs then hyperbolically (and confusingly) claim that our Constitution must limit “anti-competitive gerrymandering” because confining redistricting restraints to Article IV would “lead to the untenable conclusion that Wisconsin’s Constitution has nothing to say about congressional redistricting.” Br.30–31. Contrary to Plaintiffs’ intimations, Br.31, our Constitution already prohibits racial gerrymandering in congressional maps, via Article I, Section 1—consistent with this provision’s federal analogue. *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993). And, like the U.S. Constitution, Article I, Section 1 protects against malapportionment. *See Wesberry*, 376 U.S. at 18; *see also Karcher*,

462 U.S. at 747 (Stevens, J., concurring); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964). As for contiguity and respect for communities of interest, Br.31, the Legislature has respected those principles in congressional redistricting throughout our State’s history—despite the absence of an express constitutional provision, *see* Keane, *supra*, at 19–20. In all events, the *federal* Constitution empowers Congress to alter congressional-district lines and set mandatory standards if it wants. *See* U.S. Const. art. I, § 4; *see also, e.g.*, Pub. L. No. 62-5, 37 Stat. 13, § 3 (1911).

Plaintiffs argue that their claim is “judicially manageable” and point to the use of averages and computer-generated maps, Br.45–48 (emphasis omitted), but they ignore the numerous quandaries that would confront courts attempting to adjudicate “anti-competitive gerrymandering” claims in the absence of any constitutional standards. Plaintiffs simply assert that “a margin of victory [at or above] ten percentage points” in a particular district’s congressional race proves that the district is unconstitutionally anti-competitive. Br.46–47. But that does not measure competitiveness, as Plaintiffs themselves understand it. As Plaintiffs explained their theory below, a constitutional “level of competition” is that which “arises organically when all legitimate [redistricting] criteria are satisfied and competition is neither amplified nor muted intentionally.” R.198:59–60. But there is no reason to believe that such “organic[]” competition could not result in a margin of victory at or above ten percentage points.

And, of course, Plaintiffs do not even pretend to ground this 10% standard in our Constitution’s text or history.

Finally, Plaintiffs claim that “anti-competitive gerrymandering” claims are “proliferating elsewhere,” Br.42–45 (emphasis omitted), but this backfires. Almost all of Plaintiffs’ cases involve States that specifically enshrined pro-competitiveness mandates in their state constitutions, *see In re Senate Jt. Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 615 (Fla. 2012) (Fla. Const. art. III, § 21(a)); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d 676, 681 (Ariz. 2009) (Ariz. Const. art. IV, § 1(14)); *In re Colo. Ind. Legis. Redistricting Comm’n*, 513 P.3d 352, 357–58 (Colo. 2021) (Colo. Const. art. V, § 48.1(3)(a))—including *Harkenrider v. Hochul*, 38 N.Y.3d 494, 518 (2022) (N.Y. Const. art. III, § 4(c)(5)), which Plaintiffs repeatedly cite, Br.13, 26, 42–43, 48, 51. Cases that did not involve express constitutional provisions either rejected the competition-based claims at issue, *Harper v. Hall*, 868 S.E.2d 499, 549 (N.C. 2022), *overruled*, 886 S.E.2d 393 (N.C. 2023), or found that the challengers could not assert their claims, *Gonzalez v. State Apportionment Comm’n*, 53 A.3d 1230, 1254–55 (N.J. App. Div. 2012).

2. Nothing In Wisconsin’s History Supports Recognizing Plaintiffs’ Theory

a. From Wisconsin’s founding until 2024, no one had attempted to challenge a congressional map as an “anti-competitive gerrymander.” It was only in 2025—when Plaintiffs sought to intervene in an original-action petition challenging the *Johnson II* map—that anyone challenged a Wisconsin map on

“anti-competitive gerrymandering grounds.” App.209–46. A “novel legal theory,” App.599, first asserted more than 175 years after our State’s founding has no support in the State’s history, *see Kaul v. Legislature*, 2025 WI 23, ¶¶ 35–36, 416 Wis. 2d 322, 21 N.W.3d 513.

Plaintiffs’ citations of accusations of *partisan* gerrymandering that various individuals have lodged from time to time in our State’s history do not support recognizing Plaintiffs’ novel theory. The Framers of our Constitution expressed conflicting views about whether any particular proposal for legislative districting would promote or inhibit partisan gerrymandering. *See supra* pp.14–15. Delegates debated whether the Convention itself or the first Legislature should draw the State’s initial legislative districts and whether the Constitution should include a county-veto provision. *Supra* pp.14–15. So far as the historical record reflects, the Framers did not even discuss, let alone adopt, a constitutional provision limiting partisan gerrymandering. That remained so even as the Convention approved specific, objective limitations for the drawing of legislative districts, such as the requirements that such districts adhere to county and municipal lines, be compact and contiguous, and have equal population. Journal at 605; *supra* pp.14–15.

b. While Plaintiffs claim that Wisconsin’s history is “replete with evidence” supporting objections to “anti-competitive gerrymandering,” Br.36–40, every example they cite refers to political objections to *partisan* gerrymandering, *see* Br.36–38. Each piece of history that Plaintiffs point to criticizes

“gerrymandering” as the practice of one party unfairly drawing a map to win an outsized portion of the Legislature at the expense of the other party. *See, e.g.,* Milo M. Quaife, *The Movement for Statehood, 1845–1846* (1918); Milo M. Quaife, *The Struggle over Ratification, 1846–1847* (1920); Thomson, *A Political History of Wisconsin, supra*; 1982 Wis. S. J., Reg. Sess., Vol. 3.

Plaintiffs cite two Founding-era newspaper articles from the *Racine Advocate*, Br.37, where the authors argued that a single-district system for the Legislature, rather than an at-large system, would “prevent[] all or almost all gerrymandering,” Quaife, *The Struggle over Ratification, supra*, at 438; *see also* Quaife, *The Movement for Statehood, supra*, at 298. The authors were concerned with partisan gerrymandering, as they criticized the practice of depriving “the minority [party]” of “the exact representation it ought to have in [the Legislature].” Quaife, *The Struggle over Ratification, supra*, at 438; *see also* Quaife, *The Movement for Statehood, supra*, at 300. In any event, while the Framers adopted a single-district system for the Legislature, they did not adopt any constitutional prohibition against partisan (or anti-competitive) gerrymandering. *Supra* pp.14–15, 41.

Plaintiffs next cite concerns about gerrymandered state-legislative districts that Delegates Dunn and Lakin expressed at the Second Constitutional Convention, Br.37–38, but it is difficult to see why. These Delegates’ concerns were about partisan gerrymandering, and the Framers found those concerns unconvincing. Delegate Dunn, as noted above, believed the Convention drawing the districts would encourage

gerrymandering, but the convention drew the districts anyway. *Supra* pp.14–15; *contra* Br.37–38 (misunderstanding this quote). Delegate Lakin, for his part, supported the single-district system to protect “minority rights” against “the majority”—another reference to partisan gerrymandering, Journal at 384, that was discounted given that the Framers chose not to provide a judicial remedy for gerrymandering, *supra* pp.14–15.

Plaintiffs also invoke Delegate Rountree’s objection to the congressional map that the Second Convention ultimately approved, Br.38, but that only undermines Plaintiffs’ argument, *supra* p.14. Delegate Rountree opposed that map because he thought it was a partisan gerrymander, drawn with “political considerations,” Journal at 568, to “ensure both the congressional districts [] be democratic,” *id.* at 566. The Convention overruled Delegate Rountree and placed that map into our Constitution. Journal at 620. And while the Legislature replaced that initial congressional map shortly thereafter—through its express constitutional authority, *supra* pp.14–15—that was because Wisconsin received a third seat in Congress, *supra* p.15, not because of any latent anti-partisan-gerrymandering principle.

Plaintiffs then cite a smattering of other provisions in the original Wisconsin Constitution having nothing to do with redistricting that, they claim, condemn “anti-competitive practices.” Br.38–40 (citing provisions for election of judges, shorter term limits, the limited number of governmental positions, and popular election rather than appointment for certain officeholders). These provisions show that when the Framers

wished to prohibit what Plaintiffs identify as “anti-competitive practices,” they did so with express constitutional provisions. *See* Wis. Const. art. IV, §§ 2, 4–5; *id.* art. VII, §§ 4, 5, 7.

Finally, Plaintiffs cite a veto from Governor Dreyfus against a state-legislative map drawn by the Legislature in the 1980 cycle, Br.40, where Governor Dreyfus stated that “electoral competitiveness” was a “criteri[on] . . . necessary for a fair reapportionment,” 1982 Wis. S. J., Reg. Sess., Vol. 3, at 2156–57.¹³ Governor Dreyfus’s veto does not even purport to claim that competitiveness is a constitutional requirement for redistricting. *See id.* In any event, Governor Dreyfus’s veto comes far too late in our history to inform the meaning of our Constitution. *See Kaul*, 2025 WI 23, ¶ 36.

3. This Court’s Precedents Provide No Support For Plaintiffs’ Theory

No decision of this Court in our State’s over-175-year history even arguably suggests an “anti-competitive gerrymandering claim.” *See supra* pp.15–19; *contra* Br.11, 13, 27, 41. While Plaintiffs contend that this Court’s 1892 decision in *Cunningham* “struck down state legislative plans that were blatant anti-competitive gerrymanders” that “sought to perpetuate Democratic legislators’ ascendancy and power,” Br.11, 13, 41–42 (citations omitted; brackets omitted), the basis for this Court’s holding had nothing to do with Plaintiffs’ theory here.

¹³ Available at <https://docs.legis.wisconsin.gov/1981/related/journals/senate/19820526.pdf>.

In *Cunningham*, this Court held that the Legislature had violated certain express constitutional requirements for state-legislative districts and so declared the State’s legislative maps void. 51 N.W. at 725, 730. While *Cunningham* also discussed concerns about partisan gerrymandering, *id.* at 730; accord *Zimmerman*, 22 Wis. 2d at 566, nothing in the Court’s holding suggests the Court was concerned with the competitiveness of those maps—the heart of Plaintiffs’ “anti-competitive gerrymandering” claims. *Cunningham*’s discussion of partisan gerrymandering, moreover, was ancillary to its discussion of the Constitution’s express limitations on legislative redistricting. As *Cunningham* explained, the Framers’ means for “prevent[ing] the legislature from gerrymandering” were expressed solely in Article IV. 51 N.W. at 730. Thus, courts cannot entertain partisan-gerrymandering claims; rather, courts may adjudicate claims that a map violated “sections 3, 4, [or] 5 of article 4 of the constitution.” *Id.* Or, as Justice Pinney explained, the Court may only “declare[]” a map “void” when it violates “express provisions of the constitution and those limitations necessarily or conclusively implied from it”—as opposed to “the natural, social, or political rights of the people” not specifically enshrined in our Constitution. *Id.* at 737–38 (Pinney, J., concurring). All of this is why, in *Zimmerman*, 72 years after *Cunningham*, this Court rejected the claim that *Cunningham* “only condemned gerrymandering, defined as the drawing of districts to preserve partisan political advantage,” and so was inapplicable to maps not drawn to “preserve the political status quo.” 22 Wis. 2d at 566.

Plaintiffs seize on the “preserve the political status quo” language in *Zimmerman*, Br.11, 27, 41 (quoting *Zimmerman*, 22 Wis. 2d at 566), claiming that it identifies both “anti-competitive” and “partisan” gerrymandering as constitutionally verboten, Br.41. Plaintiffs’ reliance on this “preserve the political status quo” language is misplaced. To begin, this language was part of the Court’s description of the appellant’s argument attempting to distinguish *Cunningham*, not the Court’s interpretation of our Constitution’s requirements. *Zimmerman*, 22 Wis. 2d at 566. The Court then rejected the appellant’s understanding of *Cunningham*. *Id.* In any event, this “preserve the political status quo” language, 22 Wis. 2d at 566, is not even an “[in]artfully worded” line, *Kaul*, 2025 WI 23, ¶ 28, that might be misunderstood as referring to “anti-competitive gerrymandering.” Instead, this language in *Zimmerman* clearly refers to “the drawing of districts *to preserve partisan political advantage*,” 22 Wis. 2d at 566 (emphasis added)—the hallmark of *partisan* gerrymandering, not “anti-competitive gerrymandering”—the phrase that appears in the very same sentence, 22 Wis. 2d at 566.

Finally, Plaintiffs briefly invoke *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041 (1910), Br.27, a case involving a request to include certain names on the Democratic ballot—and not redistricting. But that does not help them either. *Phelps* stated generally that a law designed beyond a reasonable doubt “to destroy minority parties” and “promote the supremacy of the one in power” would violate our Constitution. 128 N.W. at 1052. But that general statement, made outside of the redistricting context,

cannot possibly apply after *Johnson I* to the specific context of redistricting. 2021 WI 87, ¶¶ 39–52. In any event, that statement says nothing about the “anti-competitive gerrymandering” claims that Plaintiffs seek to bring here.¹⁴

III. Granting Plaintiffs Relief Would Violate The U.S. Constitution’s Elections Clause

The U.S. Constitution’s Elections Clause empowers state legislatures to draw congressional maps within the bounds permitted by Congress. This Clause limits state courts reviewing congressional maps to “the ordinary bounds of judicial review,” so as not to “arrogate to themselves the power vested in state legislatures to regulate federal elections.” *Moore*, 600 U.S. at 36. By enacting Wisconsin’s 2011 congressional map, the Legislature exercised its Elections Clause authority. Then, by utilizing a “least-change” approach when adopting the *Johnson II* map based on that 2011 map, this Court properly respected that U.S.-Constitution-based legislative authority. *Johnson I*, 2021 WI 87, ¶¶ 12, 64. Setting aside the *Johnson II* map because it adhered as much as possible to the political choices that the Legislature made under its Elections Clause authority—while invoking an “anti-competitive gerrymandering” theory found nowhere in our Constitution, our State’s history, or this Court’s precedent—would exceed “the ordinary bounds of judicial review,” *Moore*, 600 U.S. at 36 (citation omitted), in violation of the Elections Clause.

¹⁴ Plaintiffs also cite *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, Br.41–42, but they are not about redistricting or even election-law more broadly.

A. Under the Elections Clause, “[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 (emphasis added). The Clause provides a single exception, empowering Congress to “make or alter such Regulations” “by law.” *Id.* Congress has provided that, if the number of Representatives is unaltered after an apportionment, “[u]ntil a State is redistricted in the manner provided by the law thereof,” Representatives “shall be elected from the districts then prescribed by the law of such State.” 2 U.S.C. § 2a(c). So, if a state legislature does not redistrict after apportionment, the governing districts will continue unchanged. *Id.*

In *Moore*, the U.S. Supreme Court clarified the appropriate role of state courts in resolving state-law-based challenges to congressional redistricting maps, recognizing the limitations of the Elections Clause. There, North Carolina voters, among others, challenged North Carolina’s congressional map as a partisan gerrymander under that State’s constitution. 600 U.S. at 11. The parties then espoused two starkly opposed positions. The legislative defendants argued that the Elections Clause “insulates state legislatures [drawing congressional maps] from review by state courts for compliance with state law,” *id.* at 19, while the challengers argued that state courts have “free rein” to determine state law, *id.* at 34.

The U.S. Supreme Court adopted a middle ground, warning state courts against relying on forced interpretations of state law to insert themselves into congressional redistricting. *See id.*

Although “the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law,” it also does not provide “state courts” “free rein” in reviewing a congressional map. *Id.* State courts must ensure their interpretations “do not evade federal law” by “read[ing] state law in such a manner as to circumvent federal constitutional provisions.” *Id.* at 34–35. Otherwise, state courts would “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. And the U.S. Supreme Court stands ready to “review” should a state court “so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures.” *Id.* at 37.

Justice Kavanaugh then addressed what “standard a federal court should employ to review a state court’s interpretation of state law in a case implicating the Elections Clause” to determine if it exceeds the bounds of “ordinary state court review.” *Id.* at 38 (Kavanaugh, J., concurring). He considered three possibilities, each of which “convey[ed] essentially the same point: Federal court review of a state court’s interpretation of state law in a federal election case should be deferential, but deference is not abdication.” *Id.* at 38–39 & n.1. Ultimately, Justice Kavanaugh recommended Chief Justice Rehnquist’s standard from *Bush v. Gore*, 531 U.S. 98 (2000), which provides that state courts cannot “impermissibly distort[]’ state law ‘beyond what a fair reading required.” *Id.* at 38 (citation omitted). Justice Kavanaugh further clarified that this standard applies to interpretations of state

constitutions and that, when analyzing an interpretation, courts “necessarily must examine the law of the State as it existed prior to the action of the [state] court.” *Id.* at 39 (citation omitted).

It follows from these principles that when a state court must replace a state legislature’s map, utilization of the least-change approach affords the proper respect to the Elections Clause. The least-change approach is consistent with the requirement that courts “respect” the Elections Clause’s “deliberate choice” to “expressly vest[] power to carry out its provisions in ‘*the Legislature*’ of each State,” *id.* at 34 (majority op.) (emphasis added), and “honor state policies in the context of congressional reapportionment” as expressed “in the reapportionment plans proposed by the state legislature,” *White*, 412 U.S. at 795. Indeed, in these circumstances, the only way to avoid encroachment on a state legislature’s constitutional authority is to correct only the map’s legal deficiencies and leave the remaining lawful legislatively-enacted policies. *See White*, 412 U.S. at 794–95; *accord Johnson I*, 2021 WI 87, ¶¶ 12, 64; *Abrams v. Johnson*, 521 U.S. 74, 79, 99 (1997); 2 U.S.C. § 2a(c) (Congress utilizing a least-change approach when a state legislature fails to enact a new map).

B. Striking down the *Johnson II* map because it respected the Legislature’s policy decisions made pursuant to its Elections Clause authority—based on an “anti-competitive gerrymandering” theory with no basis in our Constitution or this Court’s case law—would transgress “the ordinary bounds of judicial review,” *Moore*, 600 U.S. at 36 (citation omitted), and violate the Elections Clause.

Plaintiffs asked the Panel to declare the *Johnson II* map unconstitutional because it “perpetuates . . . the 2011 congressional map’s intentional and effective effort to suppress competition.” App.67. In other words, Plaintiffs seek to declare unlawful the *Johnson II* map precisely because the Court chose not to ascribe to the remedial congressional map its own policy judgments. This Court appropriately heeded the Elections Clause in *Johnson II* by adopting a least-change map that “respect[ed]” the Clause’s “deliberate choice” to “expressly vest[] power to carry out its provisions in ‘the Legislature’ of each State,” *Moore*, 600 U.S. at 34 (emphasis added), and “honor[ed]” the Legislature’s “policies” as “expressed” in the 2011 congressional map, *White*, 412 U.S. at 795, as much as possible. The *Johnson II* map—proposed by Governor Evers—corrected only the 2011 map’s malapportionment while preserving 94.5% of the original, 2022 WI 14, ¶¶ 7, 14–15, 19, which the Court confirmed “compl[ied] with all relevant state and federal laws,” *id.* ¶ 25.¹⁵

To grant Plaintiffs’ request, the courts would have to “arrogate to themselves the power vested in state legislatures to regulate federal elections,” *Moore*, 600 U.S. at 36, and “unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution,” *id.* at 37. That is because the courts would have to replace the Legislature’s sound policy judgments for their own,

¹⁵ *Clarke* “overrule[d]” the “portion[] of *Johnson I* . . . that mandate[d] a least change approach” when adopting remedial state-legislative maps but did not address remedial congressional maps. 2023 WI 79, ¶ 63.

elevating competition over other legitimate redistricting considerations, such as incumbency. *See supra* pp.36–37. Moreover, because Plaintiffs’ theory lacks any support in our Constitution’s text, our State’s history, or this Court’s precedent, *supra* Part II.B, replacing a least-changes map based upon that theory would “transgress the ordinary bounds of judicial review,” *Moore*, 600 U.S. at 36, by “impermissibly distort[ing]” “exist[ing]” Wisconsin law far “beyond what a fair reading required,” *id.* at 38–39 (Kavanaugh, J., concurring) (citation omitted). The Elections Clause thus ends Plaintiffs’ challenge, as a matter of law.

C. Plaintiffs’ limited attempts to avoid the Elections Clause fall flat. Plaintiffs contend that *Moore* “rejected” the argument that the Elections Clause allows a state legislature to “evad[e] a state court’s exercise of its own power of judicial review.” Br.49–50. That is a straw man. As discussed, this Court’s utilization of the least-change approach when adopting the *Johnson II* map appropriately respected the limitations imposed by the Elections Clause. *See supra* pp.19, 47. The adoption of Plaintiffs’ “anti-competitive gerrymandering” theory to change that map would require the Panel to amend our Constitution and overturn this Court’s judgment in violation of the ordinary bounds of judicial review. *See supra* Part I.

Plaintiffs contend that “[e]mbracing a claim or theory of first impression does not” exceed the bounds of ordinary judicial review, Br.52, but that again misses the point. Of course state courts can adjudicate new claims, but those claims must be grounded in a “fair reading” of state law. *Moore*, 600 U.S. at 38 (Kavanaugh, J.,

concurring). Plaintiffs’ “anti-competitive gerrymandering” theory is not grounded in the Wisconsin Constitution—it is made up by Plaintiffs out of whole cloth more than 175 years after our State’s founding. Its adoption would necessarily require judicial revision of our Constitution, thereby “transgress[ing] the ordinary bounds of judicial review” and violating the Elections Clause. *Id.* at 36 (majority op.).

IV. Laches Bars Plaintiffs’ Challenge

“[W]hen a claimant’s failure to promptly bring a claim causes prejudice to the party having to defend against that claim,” laches bars that claim. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101. The requirements for laches are: “(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay.” *Id.* ¶ 12. Each element is satisfied. App.202–03. First, Plaintiffs’ unexplained delay in bringing their claims is “unreasonable.” *Brennan*, 2020 WI 69, ¶ 14. Plaintiffs could have brought this action after the adoption of the *Johnson II* map in March 2022. Second, the Congressmen and Individual Voters “lack[ed] knowledge that [Plaintiffs] would raise th[ese] claim[s].” *Brennan*, 2020 WI 69, ¶ 12; *contra* Br.54. Third, the public and the Congressmen and Individual Voters would suffer significant prejudice if this action proceeded given settled expectations that the *Johnson II* map would govern for this decade, *see Trump v. Biden*, 2020 WI 91, ¶¶ 11–12, 394 Wis. 2d 629, 951 N.W.2d 568 (citation omitted); *Brennan*, 2020 WI 69, ¶¶ 18–27—a fact Plaintiffs do not dispute, *see* Br.54. Indeed, this Court resolved

this matter over four years ago, *see Johnson II*, 2022 WI 14, ¶ 52, and since rejected a challenge to the *Johnson II* map—including from WBLD and Plaintiffs’ counsel, *supra* p.21. Revisiting the map now would upset legitimate expectations, *Trump*, 2020 WI 91, ¶¶ 11–12, and initiate another contentious redistricting fight, *see Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999).

CONCLUSION

This Court should affirm the judgment of the Panel.

Dated: August 6, 2026

Respectfully submitted,

Electronically signed by Misha Tseytlin

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 10,740 words.

Dated: August 6, 2026

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