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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 Judges David Conway, Michael Moran,
and Patricia Baker Presiding, Case No. 2025CV2252

**RESPONSE BRIEF OF THE JOHNSON INTERVENORS-
DEFENDANTS-RESPONDENTS¹**

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUKE N. BERG
LUCAS T. VEBBER
NATHALIE E. BURMEISTER

1241 N. Franklin Place
Milwaukee, WI 53202
Phone: (414) 727-9455

¹ Billie Johnson, Chris Goebel, Aaron Guenther, Charles Hanna, Tim Higgins, Lou Kowieski, Chris Muller, Eric O'Keefe, Craig Rosand, Ruth Streck, and Ronald Zahn

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ISSUES PRESENTED

1. Is this case foreclosed by *Johnson I*?

The circuit court answered yes. This Court should too.

2. Have Appellants established an unwritten and previously-unheard-of right to a sufficiently “competitive” map?

The circuit court did not reach the merits of Appellants’ novel “anti-competitive gerrymandering” theory. Nevertheless, this Court should hold that Appellants have not established a basis for such a claim in text, history, or precedent.

3. Is this case barred by the Elections Clause or laches?

The circuit court did not reach these issues, but this Court should affirm the dismissal on these alternative grounds.

INTRODUCTION

In *Johnson I*, this Court held that partisan gerrymandering claims are nonjusticiable and have no basis in the Wisconsin Constitution. To get around those holdings, Appellants have concocted a new constitutional theory that they call “anti-competitive gerrymandering.” But, as the circuit court correctly recognized, those holdings apply equally to Appellants’ novel claim. They do not ask this Court to overrule *Johnson I*, nor are their attempts to distinguish it persuasive. Regardless, Appellants cannot identify anything in the text of Wisconsin’s constitution, the history of its adoption, or this Court’s precedents to support the idea that there is an unwritten and previously-unheard-of right to a sufficiently “competitive” map for any office, much less for the federal districts at issue in this litigation. Nor do Appellants provide any workable means for courts to decide when a map is “competitive” enough. Appellants essentially invite this Court to make up both the claim and the standards for adjudicating it. This Court should decline the invitation and affirm the dismissal.

ORAL ARGUMENT AND PUBLICATION

The Court has already scheduled this case for oral argument, and by accepting this appeal, this Court has indicated that the case is appropriate for publication.

STATEMENT OF THE CASE

The Elections Clause vests the power to set Congressional district boundaries in the various state legislatures. Wisconsin’s legislature exercises this power by establishing Congressional district boundaries in the Wisconsin state statutes. See Wis. Stat. Ch. 3. Following the 2010 decennial census, the legislature adopted, and the governor signed into law, new congressional district lines. 2011 Wisconsin Act 44. Following the 2020 decennial census, those district lines needed to be updated

again. But at that time, “the legislature drew maps, [and] the governor vetoed them[.]” *Johnson v. WEC*, 2021 WI 87, ¶ 2, 399 Wis. 2d 623, 967 N.W.2d 469 (“*Johnson I*”). To resolve this impasse, this Court exercised its original jurisdiction to hear the case. *Johnson I*, 2021 WI 87, ¶ 6.

In the *Johnson* litigation, when reviewing the then-malapportioned 2011 maps, this Court “remed[ied] that malapportionment, while ensuring the maps satisf[ied] all other constitutional and statutory requirements.” *Johnson I*, 2021 WI 87, ¶ 4. The Court began by first rejecting any partisan gerrymandering claims as nonjusticiable political questions. *Id.* (explaining that partisan gerrymander claims “have no basis in the constitution or any other law and therefore must be resolved through the political process and not by the judiciary.”); see also *id.* ¶¶ 55, 60, 62 (concluding that Wis. Const. Art. I, §§ 1, 3, 4, and 22 do not say anything about partisan gerrymandering).

In this Court’s second decision in the case (“*Johnson II*”), this Court adopted Governor Evers’ proposed Congressional maps, finding that they “move[d] the fewest number of people into new districts” from Wisconsin’s most recently adopted 2011 map. *Johnson v. WEC*, 2022 WI 14, ¶ 19, 400 Wis. 2d 626, 971 N.W.2d 402.

Since then, there has been a multi-year effort to reverse this Court’s adoption of those maps. First, in January of 2024, several of the intervenors in the original *Johnson* litigation filed a “Motion for Relief from Judgment,” arguing that, in light of this Court’s subsequent decision in *Clarke v. WEC*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, the Congressional maps adopted in *Johnson II* should be overturned and new maps should be selected. Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450 (Jan. 16, 2024). That motion was denied by this Court. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450 (Mar 1, 2024).

Then last year, two separate petitions for original actions were filed with this Court. *See* Pet. for Original Action, *Bothfeld v. WEC*, No. 2025AP996-OA (filed May 7, 2025); Pet. for Original Action, *Felton v. WEC*, No. 2025AP999-OA (filed May 8, 2025). The *Bothfeld* petition brought various partisan gerrymandering claims, seeking to throw out and replace the current Congressional map. The Plaintiffs-Appellants in this action moved to intervene in that action, seeking to bring similar “anti-competitive gerrymandering” claims that they now bring here. *See* Motion to Intervene by Wisconsin Business Leaders for Democracy, et al., *Bothfeld v. WEC*, No. 2025AP996-OA (June 5, 2025). At virtually the same time, the *Felton v. WEC* petition also sought to throw out the *Johnson* Congressional map and replace it with something new. This Court denied both petitions without dissent. Order Denying Petition, *Bothfeld v. WEC*, No. 2025AP996-OA (June 25, 2025); Order Denying Petition, *Felton v. WEC*, No. 2025AP999-OA (same).

Two weeks later, Appellants here brought this separate action in the Dane County Circuit Court. R.9 (July 8, 2025). On November 25, 2025, this Court appointed a three-judge panel to hear this case *WBLD v. WEC*, 2025 WI 52, 418 Wis. 2d 515, 27 N.W.3d 522. R. 39. The Legislature, various Congressmen, and several of the original petitioners from the *Johnson* litigation (the “*Johnson* Intervenors”) intervened in that proceeding and moved to dismiss. R. 50–62, 190–191.

The three-judge panel granted those motions and dismissed this action in its entirety, concluding, correctly, that this case is foreclosed by this Court’s decision in *Johnson I*. *See infra*, Part I. This appeal followed.

STANDARD OF REVIEW

The *Johnson* Respondents agree with the Appellants that this appeal involves questions of constitutional and statutory interpretation,

which this court reviews *de novo*. *Wis. State Legislature v. Wis. Dep't of Pub. Instruction*, 2025 WI 27, ¶ 15, 416 Wis. 2d 611, 22 N.W.3d 932.

ARGUMENT

I. The Circuit Court Correctly Held That Appellants' Claims Are Foreclosed By *Johnson I*

A. *Johnson I* Resolves This Case

In *Johnson I*, this Court held that “partisan gerrymandering” claims are not viable for two separate reasons. First, unlike some other state constitutions, “the Wisconsin Constitution says nothing about partisan gerrymandering.” 2021 WI 87, ¶¶ 53–63. Instead, the “only Wisconsin constitutional limits” on redistricting, the “exclusive repository,” are found in Article IV, specifically “Sections 3, 4, and 5.” *Id.* ¶ 63. Second, and relatedly, this Court held that partisan gerrymandering claims involve “non-justiciable” “political questions,” consistent with the United States Supreme Court’s holding in *Rucho v. Common Cause*, 588 U.S. 684 (2019). 2021 WI 87 ¶¶ 40–52. As both this Court and the Supreme Court correctly recognized, there are no “judicially manageable standards” to resolve such claims—“what constitutes a ‘fair’ map poses an entirely subjective question with no governing standards grounded in law.” *Id.* ¶ 44. Moreover, because “the task of redistricting is expressly assigned to the legislature,” reassigning that task “to the judiciary to determine whether maps are fair” would “recast this court as a policymaking body rather than a law-declaring one.” *Id.* ¶ 52.

The circuit court correctly recognized that both of *Johnson I*’s holdings foreclose Appellants’ claims. As to the lack of any textual basis in the Wisconsin Constitution, this Court in *Johnson I* squarely addressed Sections 1 and 22 of Article I (two of the three constitutional provisions Appellants invoke here) and held that these do not impose any

“additional requirements” on redistricting. 2021 WI 87, ¶ 63; App. 610. Indeed, “Article I, Section 1 ... has nothing to say about partisan gerrymanders.” *Id.* ¶ 55. Likewise, Article I, Section 22 “does not supply” “a legal standard of partisan ‘fairness.’” *Id.* ¶ 62. As the circuit court rightly understood, this logic applies equally to Appellants’ claims. These sections also have “nothing to say” about so-called anti-competitive gerrymandering, nor do they “supply” a “legal standard of [competitive] fairness.” And, “[w]hile *Johnson I* did not directly address Article III or the generalized ‘right to vote,’ [this] Court effectively foreclosed this avenue as well by holding that Article IV contains ‘the exclusive repository of state constitutional limits on redistricting.’” App. 611 (quoting *Johnson I*, 2021 WI 87, ¶ 63).

Second, the circuit court recognized that partisan and “anti-competitive” theories of gerrymandering are “functionally equivalent” for purposes of nonjusticiability and “political question analysis.” App. 608. Indeed, “the competitiveness of a map poses the same type of ‘subjective question with no governing standards’ as the [partisan] fairness of a map.” *Id.* And the fact that the Constitution delegates districting to the legislature, a political body, necessarily assumes that there will be some amount of political “intent”—whether “partisan” or “anti-competitive.” *Id.* “The concepts overlap,” *id.*, so, like with partisan gerrymandering, this is a problem for “the political process and not by the judiciary.” 2021 WI 87, ¶ 4.

While *Clarke v. WEC*, overruled parts of *Johnson I*, it did not overrule the parts that resolve this case. 2023 WI 79, ¶¶ 24 (overruling any “passing statements about the contiguity requirements), 63 (overruling “any portions ... that mandate a least change approach”).

B. Appellants Do Not Ask to Overrule *Johnson I* or Even Attempt to Meet the High Bar to Do So

This Court has “repeatedly recognized the importance of stare decisis to the rule of law.” *State v. Johnson*, 2023 WI 39, ¶ 19, 407 Wis. 2d 195, 990 N.W.2d 174; *State v. Prado*, 2021 WI 64, ¶ 67, 397 Wis. 2d 719, 960 N.W.2d 869. Stare decisis ensures that “cases are grounded in the law, not in the will of individual members of the court.” *State v. Roberson*, 2019 WI 102, ¶ 97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting). Overruling a case requires a “compelling ‘special justification,’” *Prado*, 2021 WI 64, ¶ 68; *Johnson*, 2023 WI 39, ¶ 19, and a “change in the membership of the court” does not suffice. *Bartholomew v. Wis. Patients Comp. Fund & Compare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 32, 293 Wis. 2d 38, 717 N.W.2d 216; *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 95, 264 Wis. 2d 60, 665 N.W.2d 257.

This Court has identified five such “special justifications” to overturn precedent: “(1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is “unsound in principle;” or (5) the prior decision is “unworkable in practice.” *Bartholomew*, 2006 WI 91, ¶ 33; *Johnson*, 2023 WI 39, ¶ 20.

Appellants do not even *ask* this Court to overrule *Johnson I*. Accordingly, their brief does not contain any argument, whatsoever, that there is any “special justification” for overruling this part of *Johnson I*. This Court “do[es] not step out of [its] neutral role to develop or construct arguments for parties; it is up to them to make their case.” *Evers v. Marklein*, 2025 WI 36, ¶ 3 n.4, 417 Wis. 2d 453, 22 N.W.3d 789 (quoting *Halter v. WIAA*, 2025 WI 10, ¶ 22, 415 Wis. 2d 384, 19 N.W.3d 58).

Without a request or argument for doing so, this Court ordinarily “decline[s] to overrule or revisit [prior cases] on [its] own initiative.” *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶ 37, 398 Wis. 2d 92, 961 N.W.2d 635. This Court should not overrule *Johnson I* sua sponte, especially without a request to do so.

C. Appellants’ Attempts to Distinguish *Johnson I* Fall Flat

Rather than asking to overrule *Johnson I*, Appellants begin their argument with a lengthy attempt to distinguish their purported “anti-competitive gerrymandering” claim from the already-rejected “partisan gerrymandering” claims. But just like a fresh coat of paint doesn’t change the structural defects in a wall, re-branding failed and nonjusticiable “partisan gerrymandering” claims as “anti-competitive gerrymandering” does not make them justiciable. The “theories” are two sides of the same non-justiciable coin. As the circuit court explained, the theories are “functionally equivalent.” App. 608. Simply re-branding one nonjusticiable legal theory as something else does not change the fact that it is still nonjusticiable. This Court should not entangle itself in Appellants’ web of political questions.

All of the legal woes with partisan gerrymandering claims apply to any “anti-competitive gerrymandering” claim, because they target the same thing: a “fairer” map, judged by some arbitrary, subjective standard. There is no way to meaningfully distinguish between “partisan fairness” and “competitive” fairness, as the circuit court explained. App. 609. Any alleged difference between the two is merely illusory. Just as is true for partisan gerrymandering claims, to resolve the “anti-competitive” claims brought here “plaintiffs inevitably ask the courts to make their own political judgment” about what makes a map “fair” and then “to rearrange the challenged districts to achieve that end.” See *Rucho*, 588 U.S. at 705.

At their core, both “partisan gerrymandering” and “anti-competitive gerrymandering” claims are focused on altering maps to change the outcomes of elections in accordance with some concept of what outcomes “should” be. But these are questions that “the judicial department has no business entertaining ... because the question is entrusted to one of the political branches.” *Rucho*, 588 U.S. at 696.

Appellants also try to distinguish the remedy sought in a partisan gerrymandering claim versus the remedy they purportedly seek here. They say a partisan gerrymander remedy is “a map that does not skew in either party’s favor,” while an anti-competitive gerrymander remedy is “a map that does not artificially inhibit competition.” Opening Br. 24. But they also say that most districts “need not be competitive,” *id.*, and that competitiveness itself is measured by partisan electoral results. *See* Opening Br. 47 (suggesting a standard based on the “margin of victory” between the political parties). In effect they seek the same political judgment to be made, just under a different label.

What the Appellants seek is for Wisconsin courts to intervene in political questions and make value judgments based upon how much competition is “enough” in elections. There are no standards to guide them, and Appellants do not propose anything workable. *Infra* Part III. This attempt to bring a claim for “partisan gerrymandering by another name” was properly rejected by the panel below and should be affirmed here.

II. Appellants Do Not Identify Anything in the Constitutional Text, Wisconsin’s History, or Precedent That Supports a Judicially Enforceable Right to a “Competitive” Map

Even if this Court were to set *Johnson I* aside, Appellants have no persuasive textual, historical, or precedent-based argument for their novel “anti-competitive gerrymandering” claim. Appellants admit that this Court “has not yet explicitly recognized anti-competitive

gerrymandering as a distinct claim.” Opening Br. 42. Nevertheless, they ask this Court to use this case to *create* a new constitutional right to a sufficiently “competitive” Congressional map (though how much “competition” is enough is entirely unclear). That is a big ask, and it requires a strong basis in text, history, or precedent. Appellants do not come close.

This Court has “underscored that any argument based on the Wisconsin Constitution must actually be grounded in the Wisconsin Constitution.” *State v. Halverson*, 2021 WI 7, ¶ 24, 395 Wis. 2d 385, 953 N.W.2d 847. Constitutional claims must be “supported by its text or historical meaning.” *State v. Roberson*, 2019 WI 102, ¶ 56, 389 Wis. 2d 190, 935 N.W.2d 813. The “focus [is] on the language of the adopted text and historical evidence [of its meaning] including ‘the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.’” *Halverson*, 2021 WI 7, ¶ 22; *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶¶ 12, 44, 402 Wis. 2d 539, 976 N.W.2d 821. And this Court “ha[s] understood from early on that our role is not to use the constitution to create new rights and protections that are not there, but to ascertain and enforce the rights and protections that are already there, fixed by the people in the text of the constitution.” *Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶ 18, 407 Wis. 2d 87, 990 N.W.2d 122. “Where [the] constitution needs updating, the people may do so through constitutional amendment or constitutional convention; that authority has not been given to [the Court].” *Id.*

Importantly, this Court has long recognized that “the challenger in a constitutional claim has the burden of proof.” *Prehn*, 2022 WI 50, ¶ 44 (quoting *Soc’y Ins. v. Lab. & Indus. Rev. Comm’n*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385). This is a “high burden.” *E.g.*, *State v. Smith*, 2010 WI 16, ¶ 18, 323 Wis. 2d 377, 780 N.W.2d 90. And the “lack

of [a] fully developed argument” based on the text or “historical research” about the “original meaning” of that text “is fatal to the [challenger’s] position.” *Prehn*, 2022 WI 50, ¶ 44. How much more so when the claim is for a completely novel constitutional theory.

A. The Wisconsin Constitution Says Nothing About Anti-Competitive Gerrymandering

To begin, Appellants’ theory lacks any textual foundation, as this Court already recognized in *Johnson I*. They invoke Article I, §§ 1 and 22, as well as the right to vote in Article III, but these provisions say nothing whatsoever about districts, redistricting, gerrymandering (of any flavor), or competitiveness in elections.

Start with Article I, § 1. That provision reads: “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” There is no mention of anything related to “competitive” districts. The supposed “right” to a sufficiently “competitive” map clearly does not fit within the rights to “life, liberty, and the pursuit of happiness.” Nor is it related in any way to “free[dom],” “equal[ity],” or “independen[ce].” Perhaps Appellants believe that a sufficiently competitive map is one of our “inherent rights.” But that would require some historical foundation for such a right—or, at the very least, a coherent theory as to why such a right is “inherent”—but Appellants do not even attempt to make the connection.

Instead, Appellants offer only a single paragraph to explain how their newfangled “right” fits within Article I, § 1. They say, in broad strokes, that the “[t]he sweeping aspirations of Article I, Section 1 are incompatible with anti-competitive gerrymandering,” Opening Br. 33, and that Wisconsin citizens are not “equally free and independent” if

elections are not “competitive” enough. That’s not textual or legal analysis. Appellants are just making policy arguments. Similar policy arguments could be made about all sorts of things that happen in the political process; but that is not sufficient to justify making up a new constitutional right.

Article I, § 22 is not helpful to them either. That provision reads, “The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.” Wis. Const. Art. I, § 22. Again, no mention whatsoever of districts, gerrymandering, or competitive elections. As with Article I, § 1, Appellants don’t make any serious attempt to connect the new right they seek to create to any specific text in this provision. They merely assert, in a single paragraph, that so-called “anti-competitive gerrymandering” is “irreconcilable” with the “sweeping language” in Article I, § 22. Opening Br. 34. Yet again, that is just a policy argument, not legal analysis.

Finally, and the furthest reach of all, Appellants invoke the “right to vote” in Article III. Nothing about the current Congressional maps interferes with the right to vote. The right to vote does not include a right to elect one’s preferred candidate, or even to a competitive election. If it did, every candidate who loses by a significant margin (be it in a race for Congress, the state legislature, or even a county board or aldermanic district) could argue that they lost because of an “anti-competitive” map—rather than their own failure to connect with the electorate in their district.

Further undermining Appellants’ position, the Wisconsin Constitution does contain multiple provisions that directly address districting, namely in Article IV, Sections 3, 4, and 5. If the Wisconsin Constitution was intended to provide a right to a sufficiently “competitive” map, surely the drafters would have included something

in the very provisions addressing districting. The fact that they did not strongly undercuts Appellants' new claim.

B. Appellants Have No Persuasive Historical Argument, and the History They Invoke Cuts Against Them

Appellants also have no historical support for an unwritten right to a sufficiently “competitive” map.

The best they can muster are a few stray comments, none of which have anything to do with the right they assert. And only three were from delegates to the convention. The first quote they invoke is from Charles Dunn. Opening Br. 37–38. But he was advocating in favor of an amendment providing that “no county shall be subdivided” when creating districts. *Journal of the Convention to Form a Constitution for the State of Wisconsin* 381, (1848). Dunn’s comment was about why counties should be kept together—not whether there is an unwritten right to a “competitive” map—and regardless, it was his view alone. Moreover, the amendment failed 54 to 12. *Id.* at 385–86. So even if Dunn’s comment somehow implied a right to a competitive map, his view did not prevail.

Next, Appellants quote delegate George Lakin. Opening Br. 38. His comment was also during the debate on the amendment described above, and he voted against it, and against Dunn’s position. Appellants also pull his quote out of context. His full comment was, “The system of single districts was in accordance with the purest principles of democracy.” *Journal of the Convention, supra* at 384. In other words, he was merely expressing support for single-member districts, as opposed to at-large elections. His comments do not suggest that he or anyone else believed there was an unwritten right to a “competitive” map.

Strangely, Appellants then point to comments from John Rountree criticizing the boundaries of the initial two congressional districts, but

this part of the history cuts against them, not for them. Rountree's criticism largely focused on the disparate size, geographically, of the two districts. *Id.* at 564–67. The first covered only seven counties in the southeast corner of the state, “less than one tenth part of the territory.” *Id.* at 565. The second district covered the rest of the state. As Appellants note, Rountree also suggested that the districts were drawn this way to provide a safe (i.e., less competitive) democratic seat in the western district. He proposed an alternative, but Rountree's amendment failed, 37 to 23. *Id.* at 568. The allegedly uncompetitive districts were included in the final draft and were approved by the voters over Rountree's objections. *See* Wis. Const. Art. 14, § 10 (1848). In other words, if Rountree's criticism was correct, and if there really were an unwritten right to a “competitive” map, the founders probably violated that right immediately, in the very constitution they adopted. More plausibly, there is no such unwritten right.

The move from an at-large system to a system of single-member districts, which Appellants invoke, *see* Opening Br. 37, also cuts against the idea that districts themselves must be drawn to some particular outcome or level of “competitiveness.” Under a single-member district system, the level of competitiveness in districts will only match the statewide outcome if voters favoring each party are equally concentrated throughout the state. But they are not, so moving to a district system necessarily means that many districts will be less competitive than they would be under an at-large system. Thus, the requirement for single-member geographic districts itself suggests that there is no state-constitutional standard requiring districts to be drawn in a way that ensures “competition” between candidates.

The only other historical “evidence” Appellants point to is a few comments in articles from a Racine-based newspaper, an exceedingly thin reed on which to hang a new constitutional claim. Opening Br. 37.

And these articles were discussing the advantages of a “district system,” not a right to a competitive map.

Since they have nothing else, Appellants then try to “widen[] the lens” to a random assortment of stray statements in support of: (1) statehood; (2) judicial elections; (3) short terms of office; (4) smaller government; and (5) popular election. Opening Br. 38–40. What any of this has to do with anti-competitive gerrymandering is less than clear. Appellants don’t even attempt to connect the dots, nor do they explain the context of most of these quotes, like who is being quoted.

None of this is “ample evidence” of a “deeply historically rooted” right to a “competitive” map that Appellants declare it to be. Opening Br. 40.

C. None of the Cases Appellants Cite Support Their New Claim

With neither text nor history on their side, Appellants cite a smattering of cases, pulling quotes out of context, in an attempt to cobble together support for their new constitutional theory. Opening Br. 35, 40–42. None work.

The leading case Appellants invoke is *State ex rel. Atty. General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892), which, they assert, “invalidated [] anti-competitive gerrymandering.” Opening Br. 35, 40–42. But that’s simply wrong. They pull quotes out of context to reach their preferred conclusion. *Cunningham* was a challenge brought under Article IV, §§ 3–5 of the Wisconsin Constitution. *Cunningham*, 51 N.W. at 725. There was no legal claim that the map was “anti-competitive.” The primary claim was based on population inequality: the largest senate district, with 68,000 voters, was nearly twice the size of the smallest, with 38,000. And the largest assembly district, with 38,000 voters, was over *six times* the size of the smallest, with only 6,000. *Id.*

The other claims related to splitting counties, contiguity, and compactness. *Id.*

Appellants quote *Cunningham* for the proposition that the “constitution ‘was adopted upon the express ground that [it] would prevent the legislature from gerrymandering the state.’” Opening Br. 41. Their selective editing removes this quote from the necessary context. In reality, that quote of *Cunningham* was discussing the restrictions “found in sections 3, 4, and 5 of article 4 of the constitution,” namely population equality and the requirement that districts be “bounded by county, precinct, town or ward lines.” 51 N.W. at 730. The full quote is as follows:

When **these restrictions** were under discussion in the constitutional convention, they were supported and *adopted upon the express ground that they would prevent the legislature from gerrymandering the state.* [Appellants quote this]. **These restrictions** were regarded by the very able members of the convention as absolutely necessary

Id., 51 N.W. at 730. Right before that quote, Justice Orton’s opinion noted the “disparity in the number of inhabitants in the legislative districts” and the “breaking up of the lines and boundaries of counties.” *Id.* And right after that quote, he announced the holdings of the Court, that “the restrictions... found in sections 3, 4, and 5 of article 4 of the constitution, are mandatory” and the “apportionment act [was] in conflict with these restrictions.” *Id.* In other words, Justice Orton was, at most, explaining one *rationale* for “these restrictions,” i.e., the requirements in Article IV, Sections 3–5. That does not support an independent, unwritten right to a “competitive” map.

Nor does *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), stand for what the Appellants present. They argue the *Zimmerman* court “confirmed the significance of [the] ruling in *Cunningham*” and say the Court “condemned gerrymandering.” Opening Br. 41. But that’s not what this Court said or did. The “condemned

gerrymandering” line was summarizing an argument made by one of the parties in the case. *Zimmerman*, 22 Wis. 2d at 566. The Court went on to explain how *Cunningham* was not a “gerrymandering” case—rather it stood for the proposition that a “substantial deviation from per capita equality of representation producing a relative dilution of voting power” violated Article IV of the Wisconsin Constitution. *Id* at 567.

Even more of a stretch, Appellants cite to *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041 (1910). Appellants concede that *McGrael* had nothing to do with redistricting, but they argue that a few comments in the opinion could “as easily have been speaking about anti-competitive gerrymandering.” Opening Br. 35. The case challenged a law requiring a minimum number of votes in a party’s primary to be listed as that party’s candidate on the ballot, otherwise the candidate would be listed as an “independent.” The Court *rejected* the challenge, emphasizing deference to legislative enactments: “[a] highly unreasonable purpose ... is never to be attributed to the lawmaking power if that can reasonably be avoided.” *Id.* at 1044. And the Court should use “all judicial power” to sustain a law, wherever possible. Appellants urge this Court to do the opposite, to make up a new claim to transfer redistricting power to this Court. *McGrael* does not help their “anti-competitive gerrymandering” claims here, no matter how they twist it.

Appellants then turn to other irrelevant cases where they say this Court “displayed its concern about policies that diminish accountability in other contexts.” Opening Br. 41. *State v. Johnson*, 176 Wis. 107, 186 N.W. 729 (1922), was about whether a sheriff holds over their office until their successor is qualified, which is wholly irrelevant here. *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395, was about a law that gave a legislative committee the power to oversee and halt certain expenditures. The holdings of these cases are obviously irrelevant to an

“anti-competitive gerrymandering claim,” and a few sentences about “accountability” in the course of a judicial opinion do not make a new constitutional right.

These cases stand for the unremarkable proposition that this Court seeks to uphold our democratic principles inherent in our Constitution, they say nothing about “anti-competitive gerrymandering” and in fact, underscore that with all of the checks and important limits in our Constitution to protect our institutions, nothing in that document mentions anti-competitive gerrymandering in any way.

As to the supposed “proliferat[ion]” of “anti-competitive gerrymandering claims” in other states, Opening Br. 42–45, none of these cases support, even by analogy, a new constitutional claim under Wisconsin’s constitution. The Florida and New York cases involved state constitutional amendments with explicit textual requirements that have no analogue in Wisconsin’s constitution. *In re Senate Jt. Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 598–99 (Fla. 2012) (discussing Florida’s “Fair Districts Amendment”); *Harkenrider v. Hochul*, 38 N.Y.3d 494, 197 N.E.3d 437, 441 (2022) (noting “2014 constitutional amendments” “significantly altered both substantive [redistricting] standards ... and the redistricting process.”). Similarly, Arizona’s and Colorado’s constitutions, unlike Wisconsin’s, explicitly require their redistricting commissions to consider the “competitiveness” of districts (and the claims in both cases lost). *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 220 Ariz. 587, ¶¶ 34–38, 208 P.3d 676 (2009); *In re Colo. Indep. Legis. Redistricting Comm’n*, 2021 CO 76, ¶¶ 56–61, 513 P.3d 352 (Colo. 2021).

Notably, in the New Jersey case Appellants cite, the court held that a broad constitutional provision which says nothing about redistricting—similar to what Appellants invoke here—*did not* provide a right to challenge a map based on “a lack of competitive districts.”

Gonzalez v. State Apportionment Comm’n, 428 N.J. Super. 333, 53 A.3d 1230, 1254–55 (App. Div. 2012).

The rest of the cases involve *partisan* gerrymandering claims—not “anti-competitive gerrymandering” claims—and some of these also invoked specific constitutional prohibitions not found in Wisconsin’s constitution. *E.g.*, *Adams v. DeWine*, 2022-Ohio-89, ¶ 4, 167 Ohio St. 3d 499, 195 N.E.3d 74.

* * * * *

In short, Appellants do not come anywhere near establishing a constitutional right against “anticompetitive gerrymandering.” The burden is on them to show, through text, history, or precedent, that such a right exists. They have not met their burden, and this Court should affirm the dismissal of their claims for that reason alone.

III. Appellants Do Not Offer a Judicially Manageable Standard for Judging When a Map is Sufficiently “Competitive”

Even if the Wisconsin Constitution could be read to prohibit “anti-competitive gerrymandering” (and it cannot), the practical reality is that Appellants’ legal theory is unworkable and unmanageable. Courts simply are not equipped to do the job Appellants want them to do. These are political questions for the political branches to grapple with. The proposed standard for adjudicating these claims is not manageable.

As this Court is well aware, one of the main reasons that partisan gerrymandering claims were found to be non-justiciable was the lack of any “judicially manageable standards for deciding such claims.” *Rucho*, 588 U.S. at 691; *Johnson I*, 2021 WI 87, ¶ 41. Indeed, parties and academics struggled for “several decades” trying to come up with judicially manageable standards for evaluating such claims, but none work. 588 U.S. at 699–703.

Given that history, it is incumbent upon Appellants to explain to this Court how their new, made-up claim can practically be applied. Yet they devote only three pages to that question, and they offer nothing new. What Appellants propose is a two-part test: (1) they would first look for anti-competitive intent, and then (2) they'd look for anti-competitive effect as measured against "lawful alternative maps." Opening Br. 48.

A. The Supreme Court Has Already Rejected Appellants' Proposed Test

Appellants' intent-and-effects test is apparently based upon the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109, 127 (1986). Opening Br. 45. But "the legacy of the plurality's test is one long record of puzzlement and consternation." *Vieth v. Jubelirer*, 541 U.S. 267, 282 (2004) (plurality op.). Indeed, the *Bandemer* plurality's intent-and-effects framework "was misguided when proposed, has not been improved in subsequent application, and [was] not even defended before us today by the appellants, [and] we decline to affirm it as a constitutional requirement." *Id.* at 283–84.

This intent-and-effects test failed because courts were required to decide how much partisanship (or here, how much "competition") is the "right" amount with "no legal standards discernible in the Constitution." *Rucho*, 588 U.S. at 686. Appellants ignore this lengthy history of their failed test in the courts. Substituting "anti-competitive" for "partisan" does not cure the defects with the flawed standards they propose. Determining whether mapmakers act with the purpose of inhibiting competition and then whether they succeeded to a constitutionally intolerable degree still demands courts make the exact same political judgments that *Rucho* and *Johnson I* held to be nonjusticiable.

B. Appellants' Effects Test Is Arbitrary and Unworkable

The biggest problem with Appellants' theory is how to decide when a map (or particular district) is sufficiently "competitive." There are many difficult questions to which Appellants have no answers.

The first is how to measure the "competitiveness" of a map. The result of any given election is a complex mix of the candidates, issues, turnout, geography, even the weather or other events occurring on election day. How are courts supposed to account for the issues that drive voters? If one candidate is wildly popular and receives 70% of the vote in an election, is that district invalid because the voters liked that candidate too much? Or, if one party does particularly well in an election cycle or series of election cycles due to the nuances of that political moment, does that become evidence that the map itself is "anti-competitive"? How are courts supposed to disaggregate the effects of the map from those of the candidates, issues, parties, political messaging, strategy, ground-game, etc.?

Appellants propose comparing the challenged map (or individual district) to "many computer-generated maps" using metrics such as "margin of victory," but that doesn't begin to solve the many problems. Opening Br. 46. For one thing, the only way to compare the "competitiveness" of a computer-generated map is to plug in actual election results from the existing map. But the districts in any computer-generated map will be entirely different, so, if that hypothetical map were actually used, the candidates also would have been different. And their campaigns would be different too, since politicians tend to tailor their campaigns to the electorate in their districts. Voters don't vote purely on party lines, they vote for people, so one cannot assume that they would vote with the same party if the candidates and campaigns were changed. In other words, inputting the votes from the actual map into an entirely different map yields a "result" that would never exist in

reality, even if that computer-generated map were adopted. And a map that appears to be more competitive in an impossible, hypothetical world, may turn out to be just as “uncompetitive” if actually implemented.

Next, for any map, any measure of competitiveness will vary—even substantially—with each election conducted under that map. Indeed, one of Wisconsin’s eight Congressional seats flipped parties just two elections ago, under the map Appellants claim is “anti-competitive.” How many elections are needed to compare the competitiveness of the current map with some randomly generated maps? 1? 2? 5? Should they be averaged? Is one sufficiently “competitive” election enough to save a map? Or does one sufficiently uncompetitive election doom a map? Or should the most and least “competitive” elections be excluded?

Even if those questions were answered, what is the threshold below which a map becomes unconstitutional? Does the existing map have to exceed the average competitiveness of computer-generated maps? Or the median? Or does it have to fall within some range of the mean or median? What range? Some percentage? A standard deviation or two? How is this Court, or any court, supposed to select a threshold? Nothing in the Constitution supplies a threshold, so either this Court, or lower courts, would have to make it up.

The questions become even more difficult when one starts to ponder Appellants’ position that an “anti-competitive” gerrymandering claim can be “district-specific” or “plan-wide.” Opening Br. 47. After all, changing the boundaries of any given district necessarily changes the boundaries of the districts around it. If one district flunks some arbitrary threshold of competitiveness, what happens if changing that district causes the districts around it to flunk that threshold? Does one “uncompetitive” district alone require redrawing the entire map or region?

There are no standards that can account for all of this, and Appellants' proposed test certainly does not make this work.

Appellants argue their effects test is “the gold standard in contemporary redistricting litigation.” Opening Br. 47 (citing Justice Kagan’s dissent in *Rucho*, 588 U.S. 737–38). But the majority in that same case reached the opposite conclusion and rejected that approach. *Rucho*, 588 U.S. at 714–18. Indeed, the majority even discussed a few of the problems with a standard based on the “competitiveness” of districts:

Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation.

Rucho, 588 U.S. at 708.

Appellants offer no answers to the questions above. They just suggest that a district is competitive if it falls below some arbitrary threshold (10%), and that the plan as a whole is unconstitutional if it produces fewer competitive districts than “the vast majority” of computer-made simulated maps. Opening Br. 46–47. Appellants make no attempt to ground these thresholds in constitutional text or history. They essentially ask this Court (or the trial court) to make legislative decisions about how much “competition” is enough and how to measure and compare “competitiveness.” But those kinds of policy choices are political questions for elected lawmakers, not legal questions for Courts to decide.

Appellants' arbitrary proposed threshold further illustrates the unworkability of their novel claim. Consider their brief suggestion that a district could be “deem[ed]” competitive if it has a “margin of victory

below ten percentage points.” Br. 47. If that “test” were applied to the most recent election under the current state assembly map (the one adopted after this Court’s decision in *Clarke v. WEC*), the vast majority of the districts in that map would be deemed “uncompetitive.” Indeed, out of 99 seats, only 24 had a margin of victory of 10% or less.² Nearly half of the seats (46), were won with over 60% of the vote (a margin of victory of 20% or more), and another sixteen were so uncompetitive they were uncontested. *Supra* n.2. And this is just one example.

In short, there are no manageable standards by which to review Appellants’ claims. The dismissal of their complaint was proper.

C. Appellants’ Intent Prong Is Also Problematic

The intent half of Appellants’ test is also problematic, especially in the unique circumstances of this case. Appellants discuss the intent half of their test only briefly, in a single paragraph, Opening Br. 46, but this also raises a number of difficult questions that underscore the unworkability of their proposed standard.

The Supreme Court has long recognized the significant difficulties inherent in any “intent-based” inquiry into partisan or political motivations in the redistricting context. *See, e.g., Vieth*, 541 U.S. at 284–86 (explaining some of the difficulties with the intent prong of the test); *see also* Section III.A., *supra*. Substituting “anti-competitive” for “partisan” does nothing to cure these defects. Determining whether mapmakers acted with the purpose of inhibiting competition—and whether they succeeded to some constitutionally intolerable degree—still requires courts to make the same inherently political judgments

² Wisconsin Elections Commission Canvass Reporting System, County by County Report, 2024 General Election, https://elections.wi.gov/sites/default/files/documents/County%20by%20County%20Report_Assembly.pdf; *for visualization, see* https://en.wikipedia.org/wiki/2024_Wisconsin_State_Assembly_election.

that *Rucho* and *Johnson I* held to be nonjusticiable. *Rucho*, 588 U.S. at 705–08; *Johnson I*, 2021 WI 87, ¶¶ 40–52.

For example, whose intent matters? As this Court is well aware, the current Congressional map was proposed by Governor Evers and adopted by four members of this Court in *Johnson II*. 2022 WI 14, ¶¶ 13–25. So, does Governor Evers’ intent control? Or that of his staff or consultants who produced the map to submit to this Court? Or is this Court’s intent relevant, since it selected between the proposed alternatives? Or is it some combination? Courts selecting maps in the exercise of their own equitable powers to remedy malapportionment do not act with the kind of “anti-competitive intent” that Appellants posit; they act to ensure constitutional obligations are fulfilled. *Johnson I*, 2021 WI 87, ¶ 4. If this Court’s intent controls, then Appellants’ claim should immediately fail, even under their own test.

Appellants appear to believe that the Court should disregard intervening events and evaluate intent based on the prior, now-replaced map, *see* Opening Br. 17, but they don’t justify that leap. And even if this Court were to follow Appellants down that unusual path to intent, there are still difficult questions about whose intent matters. Is it the Congressional delegation in place back in 2011, only one member of which (Gwen Moore) is still in Congress? Or the staffers who helped put together the maps? *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 846 (E.D. Wis. 2012). Or is it the intent of the legislature in place at the time that adopted the bill containing the Congressional map? *Id.* And how is one supposed to determine the intent of a multi-member body, whose members may have had different motivations?

Finally, even if 2011 were the operative date in terms of intent, evidence of intent 15 years ago will be stale at this point. Memories fade,

witnesses become unavailable, and documents may be lost or incomplete. *See* Section IV.B., *infra*.

In short, Appellants' intent prong is every bit as unworkable as their effects prong. It requires courts to answer unanswerable questions about whose intent controls, to aggregate the motives of multi-member bodies, and to reconstruct long-stale evidence of subjective purpose. These are not judicially manageable inquiries. The circuit court properly dismissed the complaint, and this Court should affirm.

IV. This Lawsuit Is Procedurally Improper

A. Adopting Appellants' Novel Theory to Replace the Map Would Violate the Elections Clause

Article I, Section 4, of the United States Constitution vests in State *Legislatures* the authority to “prescribe” the “times, places and manner of holding elections for Senators and Representatives.” In *Moore v. Harper*, 600 U.S. 1 (2023), the United States Supreme Court recognized that, while “the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein.” 600 U.S. at 34. State courts “may not 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.

While Courts have a role to play in resolving impasses in the redistricting process, as this Court did when it selected the Congressional maps in *Johnson*, that role is limited. Taking a mid-decade second bite at the apple through a novel and never-before recognized legal theory would “transgress the ordinary bounds of judicial review” in a way that would violate the elections clause, especially given the lack of any basis for Appellants' novel claim. *See supra*, Part II.

B. Appellants' Claim Is Barred by Laches

Laches is a “well-settled doctrine” that applies to bar relief “when a claimant’s failure to promptly bring a claim causes prejudice to the party having to defend against that claim.” *Trump v. Biden*, 2020 WI 91, ¶ 10, 394 Wis. 2d 629, 951 N.W.2d 568; *Wis. Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101. And laches “has particular import in the election context,” where unreasonable delay causes “obvious and immense” prejudice to “election officials, [] candidates, ... and to voters statewide.” *Trump*, 2020 WI 91, ¶¶ 11–12.

Courts have applied laches to bar tardy redistricting challenges because “voters have come to know their districts and candidates, and will be confused by change,” and because Court-ordered redistricting can result in “voter confusion, instability, dislocation, and financial and logistical burden on the state.” *Fouts v. Harris*, 88 F. Supp.2d 1351, 1354–55 (S.D. Fla. 1999), *aff’d sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); *White*, 909 F.2d at 104; *see also Knox v. Milwaukee Cnty. Bd. of Elections Comm’rs*, 581 F. Supp. 399, 405, 408 (E.D. Wis. 1984) (applying laches and denying motion for a preliminary injunction in a Milwaukee County redistricting lawsuit).

There are three elements to a laches claim: “unreasonable delay, lack of knowledge a claim would be brought, and prejudice.” *Brennan*, 2020 WI 69, ¶ 1. Once each element is proven, “application of laches is left to the sound discretion of the court asked to apply this equitable bar.” *Id.* ¶12. All three elements are easily met here.

First, unreasonable delay. As explained above, Appellants’ theory as to why the current Congressional map is an “anti-competitive gerrymander” is based on how it was adopted *back in 2011*. Opening Br. 17–18. Although that map has since been replaced, Appellants argue

that its alleged flaws were “perpetuated” in 2021. *Id.* Yet no fewer than *seven* Congressional elections have occurred during the fourteen years since the supposed constitutional violation in 2011: 2012, 2014, 2016, 2018, 2020, 2022, and 2024. Courts have found similar delay—even much less delay—to be unreasonable in redistricting cases. *Fouts*, 88 F. Supp. 2d at 1354 (7 years, 4 elections); *White*, 909 F.2d at 102–103 (17 years); *Knox*, 581 F. Supp. at 404 (“31 months after the approval of the tentative proposal and 22 months after the adoption of the final plan.”).

Second, neither the Defendants nor the Intervenor (voters, the Congressmen, the Legislature, etc.) had any reason to believe this claim would be brought many years and seven elections after it could have been filed. This element is easily satisfied. *See Trump*, 2020 WI 91, ¶ 23; *Brennan*, 2020 WI 69, ¶ 18.

Lastly, Appellants’ unreasonable delay causes multiple kinds of prejudice. First, courts have recognized that long-delayed redistricting cases prejudice voters, who “have come to know their districts and candidates, and will be confused by change.” *Fouts*, 88 F. Supp. 2d at 1354; *White*, 909 F.2d at 104 (“two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system”); *see also Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (“Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system.”). The current representatives will be prejudiced in the same way, having come to know their districts and constituencies. The state—and its taxpayers—will also be prejudiced by the “financial and logistical burden” caused by rinse-and-repeat redistricting. *E.g.*, *Fouts*, 88 F. Supp. 2d at 1354; *White*, 909 F.2d at 104 (emphasizing “great financial and logistical burdens”).

Finally, Appellants’ unreasonable delay causes “evidentiary prejudice.” *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 33, 389 Wis.

2d 516, 936 N.W.2d 587. As noted above, Appellants rely on the intent of the drafters of the 2011 map. Opening Br. 17–18. But proving or disproving intent is much more difficult fifteen years after the fact. This Court has recognized that “the loss of evidence,” the unavailability of a witness, and the “unreliability of memories” are “precisely the kind of thing[s] laches is aimed at.” *Wren*, 2019 WI 110, ¶¶ 33–34.

The Appellants waited far too long to bring their claim to the Courts, and laches applies.

While the circuit court did not reach this issue, the *Johnson* Intervenor (and other Intervenor) raised it below, R.191:15–18, and this Court can affirm on that alternative basis. See Wis. Stat. § 809.62(3m)(b)1.

CONCLUSION

This Court should affirm the circuit court’s order dismissing this case.

Dated: August 6, 2026.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by
Luke N. Berg

Richard M. Esenberg (#1005622)
Luke N. Berg (#1095644)
Lucas T. Vebber (#1067543)
Nathalie E. Burmeister (#1126820)

1241 N. Franklin Place
Milwaukee, WI 53202
Telephone: (414) 727-9455
Rick@will-law.org

Luke@will-law.org
Lucas@will-law.org
Nathalie@will-law.org

*Attorneys for Intervenors-
Defendants-Respondents Billie
Johnson, Chris Goebel, Aaron
Guenther, Charles Hanna, Tim
Higgins, Lou Kowieski, Chris
Muller, Eric O'Keefe, Craig Rosand,
Ruth Streck, and Ronald Zahn*

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), (c) for a brief produced with a proportional serif font. The length of this brief is 8,304 words.

Dated: August 6, 2026.

Electronically signed by Luke N. Berg

LUKE N. BERG