

FILED

08-07-2026

CLERK OF WISCONSIN
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 MEA-
GAN WOLFE,

Defendants-Respondents,

BILLIE JOHNSON, CHRIS GOEBEL, AARON GUENTHER, CHARLES HANNA, TIM HIG-
GINS, 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 HUT-
CHESON, PATRICK KELLER, PATRICK MCCALVY, MIKE MOELLER AND
WISCONSIN STATE LEGISLATURE,

Intervenors-Defendants-Respondents.

BRIEF OF RESPONDENT THE WISCONSIN STATE LEGISLATURE

Appeal From The Dane County Circuit Court, The Honorable David Conway,
the Honorable Michael Moran, and the Honorable Patricia Baker, Presiding

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STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The Court set this case for argument to be heard on September 16, 2026. Any opinion should be published given the statewide importance of the issues.

INTRODUCTION

Accusations of gerrymandering are as old as the country itself. Beginning with the first congressional elections, founders as prominent as George Washington accused Anti-Federalists of gerrymandering Virginia's congressional districts. *See Rucho v. Common Cause*, 588 U.S. 684, 696 (2019). Those same founders chose a political solution, not a judicial one. The federal Constitution tasks "the Legislature" of each State with redistricting and gives Congress a check on that power. U.S. Const. art. I, §4, cl. 1. Never did the founders consider *courts* eligible to judge whether districts should be more "competitive," or more Republican, or more Democratic, or more anything as far as their political makeup is concerned.

There's no reason for this Court to insert itself into that political thicket now. Nothing in the Wisconsin Constitution allows courts to police "lack of competition" in congressional elections. There are no judicial standards to decide whether congressional districts are "anti-competitive" or that incumbents have it too easy. Plaintiffs' desires are political. Their solution lies with Congress or a constitutional amendment, not courts.

None of this should come as a revelation. This Court already refused to referee the politics of the congressional districts in the *Johnson* original action. *Johnson v. Wis. Elections Comm'n (Johnson I)*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469. The Court did what was required to remedy the malapportionment following the 2020 census and no more. *Johnson v. Wis. Elections Comm'n (Johnson II)*, 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402. This Court held the modified districts "compl[ied] with all relevant

state and federal laws.” *Id.* ¶25. That should have settled the congressional districts for the decade.

Plaintiffs’ lawsuit is the fourth attempt to unsettle the congressional districts. Three previous times, this Court has rightly declined to revisit them. The Court should not change course now. Plaintiffs’ fourth attempt offends every norm of judicial review. Plaintiffs asked a circuit court to declare this Court’s final judgment unconstitutional. Worse, they asked that court to order the Wisconsin Elections Commission not to comply with this Court’s permanent injunction. Any court would dismiss. To do anything else would unconstitutionally “transgress the ordinary bounds of judicial review” and “arrogate to” the state courts “the power vested in state legislatures to regulate federal elections” in the U.S. Constitution. *Moore v. Harper*, 600 U.S. 1, 36 (2023).

STATEMENT OF THE CASE

A. The Legislature enacted new congressional districts in 2011. *See* 2011 Wis. Act 44. Plaintiffs challenged the districts as politically unfair. *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012) (three-judge panel). They lost. *Id.* (finding no “workable standard” to “evaluate the merits”).

A decade later, the Legislature passed new congressional redistricting legislation making very few changes to the 2011 districts. *See* 2021 Wis. Senate Bill 622; *Johnson II*, 2022 WI 14, ¶14 (2021 legislation kept 93.5% of people in existing districts). The Governor vetoed that legislation. *See* Wis. Governor’s Veto Message, 2021 Senate Bill 622 (Nov. 18, 2021).

With no new districts, voters initiated an original action in this Court. They asked to enjoin the use of the 2011 districts because they were unconstitutionally malapportioned. *Johnson I*, 2021 WI 87, ¶5. This Court granted the petition for an original action. There was no dispute that districts were malapportioned. *Id.* ¶¶4-6. This Court invited further briefing about how to remedy the malapportionment to ensure modified districts complied with all state and federal requirements. *Id.* ¶¶6-7.

Relevant here, this Court concluded it would make the “least change[s] necessary” to the legislatively enacted districts from 2011. *Id.* ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring) (concluding “[i]t is appropriate for us to start with the laws currently on the books” and make only “necessary modifications”). The only “necessary” changes to the existing districts were those required “for the maps to comport with relevant legal requirements.” *Id.* ¶72 (plurality op.).

For those legal requirements, this Court *rejected* arguments that the Wisconsin Constitution required the Court to ensure “maps are fair.” *Id.* ¶52 (majority op.). This Court concluded there was “no plausible grant of authority” for courts to make quintessentially political determinations about the political makeup of districts. *Id.* Among other problems, “no legal standards exist to limit and direct [the Court’s] decisions” in that regard. *Id.*

Among the remedial plans proposed by the parties in *Johnson*, this Court chose Governor Evers’s proposal. *Johnson II*, 2022 WI 14, ¶¶13-19. The Court held the modified congressional districts “compl[ied] with all relevant state and federal laws.” *Id.* ¶25. The injunction requiring the

Elections Commission to use the *Johnson II* districts in congressional elections remains in place today. *Id.* ¶52.

B. This Court has since declined to revisit the congressional districts three times. First, in early 2024, the Court denied a motion to reopen the *Johnson* litigation to reconsider the congressional districts after *Clarke v. Wis. Elections Comm’n*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, reconsidered the state legislative districts. *See Order, Johnson*, No. 2021AP1450-OA (Wis. Mar. 1, 2024). Second, in 2025, the Court denied a petition for a new original action alleging the *Johnson II* injunction left the congressional districts malapportioned. *See Order, Felton v. Wis. Elections Comm’n*, No. 2025AP999-OA (Wis. June 25, 2025). Third, in 2025, the court denied a petition for a new original action alleging the congressional districts were politically unfair. *See Order, Bothfeld v. Wis. Elections Comm’n*, No. 2025AP996-OA (Wis. June 25, 2025).

C. Plaintiffs initiated this action in the circuit court in July 2025—more than 3 years after the *Johnson II* injunction, nearly 14 years after the enactment of Act 44, and after 3 failed attempts to convince this Court to revisit *Johnson II*. Plaintiffs challenged the political fairness of Wisconsin’s congressional districts, alleging they were too “anti-competitive” to be constitutional. App.52-53. Plaintiffs faulted the *Johnson II* districts for looking too much like the legislatively enacted 2011 districts, thereby perpetuating their alleged unfairness. App.49-53, 66-68. Plaintiffs asked the circuit court to declare the *Johnson II* districts unconstitutional, enjoin their

use in future elections, and adopt new districts that are “not unconstitutionally uncompetitive” and create “partisan fairness.” App.76.

Because Plaintiffs challenged Wisconsin’s congressional districts, this Court convened a three-judge panel. *WBLD v. Wis. Elections Comm’n*, 2025 WI 52, 418 Wis. 2d 515, 520, 27 N.W.3d 522. Justice Hagedorn, concurring in part, observed how Plaintiffs’ complaint made “the rather extraordinary plea for the circuit court to declare a 2022 decision and order of this court” — that is, the *Johnson II* injunction—“unconstitutional.” *Id.* at 522. He emphasized that issue was for the circuit court to decide in the first instance. *Id.* With proceedings back before the three-judge panel, the Legislature intervened and moved to dismiss.

D. The circuit court dismissed Plaintiffs’ suit. The court held Plaintiffs’ “anti-competitive gerrymandering” claims “are non-justiciable and non-cognizable under Wisconsin law.” App.600. The panel considered those claims “functionally equivalent to partisan gerrymandering claims,” unable to “meaningfully distinguish between ‘fairness’ and ‘competitiveness’ for purposes of *Johnson I*.” App.608-09. Applying that “binding precedent,” the panel concluded Plaintiffs’ claims were “non-justiciable political questions.” App.609. Among other justiciability hurdles, the court observed that the “fluctuating nature of political identity” and the “lack of party registration” in Wisconsin left the panel unable to ascertain the “competitiveness of a district.” App.608. Ascertaining competitiveness “pose[d] the same type of ‘subjective question with no governing standards’ as the fairness of a map.” *Id.* The panel “alternatively dismiss[ed] Plaintiffs’

claims for failure to state a cognizable constitutional cause of action,” “bound by” *Johnson I.* App.611. Having dismissed on those grounds, the panel did not address whether it had “authority to modify” this Court’s *Johnson II* injunction. App.606.

ARGUMENT

I. This Court should affirm because circuit courts do not override this Court’s final judgments.

The Court should affirm for the simple reason that circuit courts cannot “overrule,” “modify,” or otherwise disturb this Court’s final judgments. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Affirming on these grounds avoids further involvement in the “inherently political and partisan endeavor” of redistricting. Order 14, *Johnson*, 2021AP1450-OA (Wis. Sept. 22, 2021) (Dallet, J., joined by Walsh Bradley and Karofsky, JJ., dissenting). The Court need only reaffirm its constitutional supremacy and superintending authority “over all courts,” Wis. Const. art. VII, §3, without even reaching the merits of Plaintiffs’ political claims.

Plaintiffs’ presentation of the issues elides the extraordinary nature of this litigation. The congressional districts they challenge exist by virtue of this Court’s permanent injunction entered against the Elections Commission in *Johnson II*. See 2022 WI 14, ¶52. This Court held those districts “compl[y] with all relevant state and federal laws.” *Id.* ¶25; see also *id.* ¶7 (“Governor Evers’ submission complies with the federal Constitution and all other applicable laws.”); *id.* ¶20 (similar). The Court’s final judgment orders the

Elections Commission to use them “for all upcoming elections” and “until new maps are enacted into law or a court otherwise directs.” *Id.* ¶52. Despite all that, Plaintiffs went to circuit court for a declaration that this Court’s final judgment was unconstitutional and a superseding injunction.

Nowhere do Plaintiffs address their “extraordinary plea” for the circuit court to override a still-binding injunction of this Court. *WBLD*, 418 Wis. 2d at 522 (Hagedorn, J., concurring in part, dissenting in part). Plaintiffs had no basis to ask the circuit court to *enjoin* the Elections Commission from using the districts this Court ordered it to use. *But see* App.76. Their complaint “place[d] a circuit court ... in the absurd, not to mention unconstitutional, position of reviewing the Wisconsin Supreme Court’s interpretation of the law.” *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶45, 376 Wis. 2d 147, 897 N.W.2d 384. There was no change in law (such as a supervening U.S. Supreme Court decision) and no new facts (such as an intervening census) that could warrant revisiting the congressional districts. *Cf. Wis. Legis. v. Wis. Elections Comm’n*, 595 U.S. 398 (2022) (per curiam) (reversing *Johnson II* with respect to state legislative districts); *Perry v. Perez*, 565 U.S. 388, 392 (2012). Whatever Plaintiffs think about the existing districts, there is a final judgment of this Court that concludes the districts are constitutional and requires the Elections Commission to use them. *Johnson II*, 2022 WI 14, ¶¶25, 52.

This Court’s *Johnson II* judgment remains “final and conclusive.” *Ean v. Chi., Milwaukee & St. Paul Ry.*, 101 Wis. 166, 76 N.W. 329, 330 (1898). The Elections Commission remains bound to obey the *Johnson II* injunction. *See*

Cline v. Whitaker, 144 Wis. 439, 129 N.W. 400, 400-01 (1911); *State ex rel. Fowler v. Cir. Ct. of Green Lake Cnty.*, 98 Wis. 143, 73 N.W. 788, 790 (1898) (same). Circuit courts have “no power to vacate or set ... aside” the existing districts. *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶50, 303 Wis. 2d 94, 735 N.W.2d 418. “Subjecting this court’s decisions to review by a circuit court would obviously interfere with [its] duties and responsibilities as Wisconsin’s court of last resort.” *Gabler*, 2017 WI 67, ¶45.

Plaintiffs, represented by the same counsel, said so themselves last year. When they moved to intervene in one of the unsuccessful original actions, they implored this Court to grant the petition because “only this Court has the authority to enjoin that map or otherwise alter the order” entered in *Johnson II* “that requires [the Elections Commission] to hold elections under the map.” Mot. to Intervene by WBLD et al. Ex. ¶16, *Bothfeld*, No. 2025AP996-OA (Wis. June 5, 2025) (WBLD Mot. to Intervene). By Plaintiffs’ own logic, the denial of that petition should have marked the end of the road. But they went to the circuit court anyway, as though that court (and the Elections Commission) could ignore the *Johnson II* injunction. There is no reconciling Plaintiffs’ extraordinary request with their earlier representations to this Court.

If Plaintiffs wanted to undo the *Johnson II* districts, Plaintiffs needed to initiate proceedings in *this Court*, not the circuit court. Ordinarily, the “sole remedy” to challenge an injunction is “by motion to vacate the injunction” in the same case—here, in *Johnson*. *Fowler*, 73 N.W. at 790. To revisit injunctions issued by this Court in an original action, parties have

moved for reconsideration or petitioned for a follow-on original action in this Court. *See* Wis. Stat. §809.64; *see also Clarke*, 2023 WI 79, ¶54. With respect to these congressional districts, plaintiffs already asked this Court to reopen *Johnson* and initiate new original actions, and this Court denied those requests. *Supra* p.15. The *Johnson II* injunction therefore “must be obeyed while in existence.” *Fowler*, 73 N.W. at 790. There was no basis for Plaintiffs’ circuit court action to circumvent the *Johnson II* injunction.

This Court may affirm the dismissal of Plaintiffs’ suit on those alternative grounds without reaching the merits. *Koestler v. Pollard*, 162 Wis. 2d 797, 809 n.8, 471 N.W.2d 7 (1991); *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). There is no question circuit courts lack “the power to overrule [or] modify” the *Johnson II* injunction. *Cook*, 208 Wis. 2d at 189; *accord Tietsworth*, 2007 WI 97, ¶50; *cf. Wis. Voter All. v. Secord*, 2025 WI 2, ¶¶3, 40, 414 Wis. 2d 348, 15 N.W.3d 872 (reversing for “patent violation of *Cook*” and declining to “thwart the ‘principles of predictability, certainty and finality’”).

II. This Court should affirm because Plaintiffs’ claims are neither justiciable nor cognizable.

Even if *Johnson II* had not settled the congressional districts for the decade, dismissal is warranted. Plaintiffs ask this Court to cement their policy preferences as a constitutional mandate. Plaintiffs want competitive districts, and they do not like favoring incumbents. Nowhere does the Wisconsin Constitution impose those political desires on all Wisconsinites.

This Court already held that the Wisconsin Constitution confers no “plausible grant of authority” for courts to referee the politics of districts. *Johnson I*, 2021 WI 87, ¶¶39-63. The federal and state constitutions assign redistricting to state legislatures. History shows that Congress, not courts, may check partisan manipulation by state legislatures. Absent a constitutional amendment, the Wisconsin Constitution confers no authority for courts to decide between different political philosophies for what is fair in redistricting.

A. *Johnson I* forecloses Plaintiffs’ claims.

The circuit court correctly dismissed Plaintiffs’ political challenge as nonjusticiable and not cognizable. App.606-11. In *Johnson I*, this Court held “[t]he Wisconsin Constitution contains ‘no plausible grant of authority’ to the judiciary to determine whether maps are fair to the major parties.” 2021 WI 87, ¶52. “There are no legal standards discernable in the Constitution for” deciding “what constitutes a ‘fair’ map.” *Id.* ¶44. Plaintiffs cannot circumvent those holdings with a new label. Calling districts an “anti-competitive gerrymander” does not transform what has always been a nonjusticiable political question about the political makeup of districts into a justiciable one.

1. *Johnson I* held the Wisconsin Constitution contains no plausible grant of authority for courts to referee the political fairness of districts.

Johnson I rejected the same constitutional theories Plaintiffs present here. Article I, Section 1 “has nothing to say about partisan gerrymanders.” *Id.* ¶55. Section 22 does not provide “an open invitation to the judiciary” to

“fabricate a legal standard of partisan ‘fairness.’” *Id.* ¶62. And Article IV delineates “the standards under the Wisconsin Constitution that govern redistricting” state legislative districts. *Id.* ¶63. Absent from those standards is Plaintiffs’ imagined “lack of competition” standard for congressional elections. *Contra* Appellants’ Opening Br.15-16 (hereinafter, “Br.”).

These are *precedential holdings* of this Court, contrary to Plaintiffs’ claim that “the justiciability of partisan gerrymandering remains an open question.” Br.29-30. The circuit court correctly rejected Plaintiffs’ retelling that the interpretation of these constitutional provisions in *Johnson I* was only advisory. App.608-09. There was no way for this Court to hold the congressional districts complied with all state and federal law, *see Johnson II*, 2022 WI 14, ¶25, without first deciding what state law required (or did not require) with respect to districts’ political makeup.

Johnson I is a “binding decision.” *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981). When this Court “deliberately take[s] up and decide[s] an issue central to the disposition of a case, it is considered precedential.” *Wis. Just. Initiative v. Wis. Elections Comm’n*, 2023 WI 38, ¶142, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring). From the start in *Johnson*, intervening parties told this Court that the existing districts were gerrymandered. They “ask[ed] [the Court] to redraw the maps to allocate districts equally between th[e] dominant parties.” *Johnson I*, 2021 WI 87, ¶2; *see, e.g.,* Mot. to Intervene of Black Leaders Organizing for Communities et al. ¶10, *Johnson*, No. 2021AP1450-OA (Wis. Sept. 24, 2021) (intervening “to advocate for their interests in securing nonpartisan, fair ... districts”). In

response, the Court invited briefing specifically addressing whether it was required to consider “the partisan makeup of districts” as part of the legal requirements for districts. 2021 WI 87, ¶7. The Court concluded: “We *hold* ... the partisan makeup of districts does not implicate any justiciable or cognizable right.” *Id.* ¶8 (plurality op.) (emphasis added); *accord id.* ¶82 n.4 (Hagedorn, J., concurring). The Court found no “right to partisan fairness in Article I, Sections 1 ... or 22 of the Wisconsin Constitution.” *Id.* ¶53 (majority op.). And Article IV provides “discrete requirements governing redistricting” for statehouse districts, none of which say anything about sufficient levels of competition or incumbents. *Id.* ¶63.

The posture of *Johnson I*—considering the legal requirements of remedial plans as opposed to a “gerrymandering challenge to [a] plan” — does not make this Court’s interpretation of the Wisconsin Constitution any less binding. *Contra* Br.28. “The *ratio decidendi* of that decision is plain.” *State v. Haas*, 52 Wis. 407, 9 N.W. 9, 10 (1881); *see Bucklew v. Precythe*, 587 U.S. 119, 136 (2019) (“[J]ust as binding as this holding is the reasoning underlying it.”). The notion that the same constitutional provisions mean one thing for gerrymandering allegations in *Johnson I* and another thing for Plaintiffs’ gerrymandering allegations here is like saying the First Amendment means one thing when raised as an affirmative defense in a criminal case but another thing when raised as a basis to enjoin enforcement of a state law in a civil case.

Nothing in *Clarke* is to the contrary. *Contra* Br.29. Unlike this challenge to congressional districts, *Clarke* involved only the statehouse districts and

thus did not implicate the federal Elections Clause. 2023 WI 79, ¶3; *infra* III. *Clarke* revisited the statehouse districts after finding they violated Article IV's express contiguity requirement, 2023 WI 79, ¶¶10-35, not unspoken emanations about competitiveness. And *Clarke* overruled only part of *Johnson*—the rule that remedies *must* make only “least change[s]” to existing statehouse districts. *Id.* ¶¶61-63 (“[W]e overrule any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach.”).

As for Plaintiffs’ gerrymandering claim, *Clarke* did not disturb *Johnson I*’s interpretation of the Wisconsin Constitution as providing “no plausible grant of authority” to referee the politics of districts. *Johnson I*, 2021 WI 87, ¶52. *Clarke* expressly “declined to hear the issue of whether extreme partisan gerrymandering violates the Wisconsin Constitution.” 2023 WI 79, ¶69. *Clarke* did “not decide whether a party may challenge an enacted map on those grounds.” *Id.* Even when *Clarke* explained the Court would consider the “partisan impact” of proposed remedies, *Clarke* did *not* include “partisan impact” among the “established districting requirements set out in state and federal law.” *Id.* ¶63; *see id.* ¶¶70-71. *Clarke* leaves no reason to doubt the congressional districts complied with all state and federal law before *Clarke* and after. *See Johnson II*, 2022 WI 14, ¶25.

At bottom, Plaintiffs cannot overcome what this Court already decided: courtrooms are not the place to challenge the politics of districts. *Johnson I*, 2021 WI 87, ¶¶40-63. Relabeling their claim as one about “competitiveness” is no answer. “Competitiveness” is simply Plaintiffs’ preferred version of fairness. As this Court already held in *Johnson*, such

“[c]laims of political unfairness in the maps present political questions, not legal ones,” and “must be resolved through the political process and not by the judiciary.” *Id.* ¶4.

2. Plaintiffs’ anti-competitive gerrymandering claims are just a subspecies of nonjusticiable partisan gerrymandering claims.

Plaintiffs’ claims are not “distinct” from those considered in *Johnson I*. *Contra* Br.22. Plaintiffs’ anti-competitive gerrymandering theory is just a subspecies of partisan gerrymandering. *See, e.g., Rucho*, 588 U.S. at 706 (“Fairness may mean a greater number of competitive districts.”); *accord Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.). “More competitive” is simply Plaintiffs’ preferred benchmark for what is politically “fair” in redistricting. *See* App.55 (alleging “fair maps” are those where “fewer electoral outcomes are foregone conclusions”); App.56 (alleging “the anti-competitive gerrymander undermines WBLD’s commitment to ... fair ... elections”). Like some *Johnson* intervenors, Plaintiffs have lobbied the wrong branch of the Wisconsin government. The Wisconsin Constitution does not allow the “judiciary [to] decid[e] what constitutes a ‘fair’ partisan divide; seizing such power would encroach on the constitutional prerogatives of the political branches.” *Johnson I*, 2021 WI 87, ¶45; *see infra* II.B.3.

Plaintiffs “anti-competitive gerrymandering” claims necessarily challenge “the partisan makeup of districts” like any other subspecies of partisan gerrymandering claims. *Johnson I*, 2021 WI 87, ¶39. Plaintiffs insist other gerrymandering theories turn on “*which party wins districts*” while

their theory turns on “districts’ *competitiveness*.” Br.23. They insist that they have “very different goals.” Br.25. Whatever their “goals,” *id.*, Plaintiffs ask this court to redraw districts to deliver different election results. *See, e.g.*, App.68 (faulting 2022 and 2024 elections as having too large a margin of victory). That is an inherently political ask, not a judicial one.

No court can judge (or guess at) whether a district is sufficiently “competitive” without judging (or guessing at) the district’s political makeup. The alleged “lack of competition” necessarily requires the court to make a judgment about “which party is advantaged or disadvantaged” in existing districts. *Contra* Br.15. Plaintiffs’ whole theory presumes that one political party might have such an advantage that an allegedly unconstitutional “suppression of electoral competition” results. Br.11; *see* App.66-68 (faulting lack of competition in general elections between major parties). They want state courts to decide whether the “margin of victory” is too big in congressional elections. Br.27. Plaintiffs’ theory no less throws courts in the political thicket of redrawing districts “so that supporters of the disadvantaged party have a better shot”—a so-called “competitive” shot—“at electing their preferred candidates.” *Rucho*, 588 U.S. at 706; *see* App.65 (complaining mapdrawer incorporated preferences of Republicans and Democrats, which “made districts less competitive”).

Detailed below, *infra* II.B.4, the same justiciability problems identified in *Johnson* would plague this subspecies of partisan gerrymandering cases. For instance, Plaintiffs say competitiveness can be “evaluated using a single metric: the margin of victory of the prevailing candidate.” Br.27. But “[h]ow

much is too much?” *Rucho*, 588 U.S. at 707. And how should Wisconsin’s sizeable fraction of independents, third-party allegiants, split-ticket voters, or party-switchers be counted in what is bound to be an entirely elusive quest for just the right level of competition? See *Johnson I*, 2021 WI 87, ¶¶43, 48-49.

* * *

For all of these reasons, the circuit court correctly concluded that Plaintiffs’ anti-competitive gerrymandering claim is just a subspecies of nonjusticiable partisan gerrymandering claims. Plaintiffs’ arguments to the contrary are wordplay. Plaintiffs insist that *Johnson I* referred to “the partisan makeup of districts” only “with respect to partisan fairness—not competition.” Br.25-26. What’s the difference? Similarly, they say their desire for “a more competitive map” is different than desiring a map “fairer in partisan terms.” Br.11 How? The circuit court simply observed the obvious: Plaintiffs think the political makeup of districts is unconstitutional. App.608-09. They want them altered so that neither of “the major parties” will “wi[n] an unfairly large share” of votes. Br.25. Because a “competitive” district is Plaintiffs’ version of a fair district. See App.55-56. But *Johnson I* already held the Wisconsin Constitution does not allow the judiciary to pick sides in the political debate over what is the most “‘fair’ partisan divide” for districts—be it Plaintiffs’ desire for competitive districts or another plaintiff’s desire for a safe number of seats or another plaintiff’s desire to advantage a third party or “gun owners” or “vegetarians.” 2021 WI 87,

¶¶45, 57. The circuit court rightly rejected Plaintiffs' invitation to descend into that political thicket.

B. Plaintiffs' gerrymandering claims remain nonjusticiable.

Even if the justiciability of Plaintiffs' "anti-competitive gerrymandering" claims were an open question after *Johnson*, the Court must affirm. Plaintiffs' claims are nonjusticiable political questions. The federal and state constitutions commit redistricting to the Legislature. See *Baker v. Carr*, 369 U.S. 186, 217 (1962); *In re John Doe Proceeding*, 2004 WI 65, ¶25, 272 Wis. 2d 208, 680 N.W.2d 792. History confirms concerns of partisanship in congressional redistricting are left for Congress, not the courts. And absent some constitutional amendment, there are no "judicially discoverable and manageable standards" in either the state or federal constitutions for this Court to adjudicate competitiveness. *Baker*, 369 U.S. at 217.

1. The federal and state constitutions commit redistricting to the Legislature and Congress.

a. The federal and state constitutions assign redistricting to "the Legislature." U.S. Const. art. I, §4, cl. 1; see Wis. Const. art. IV, §3. "[R]eapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), and "state legislatures have 'primary jurisdiction' over legislative reapportionment," *White v. Weiser*, 412 U.S. 783, 795 (1973); accord *Fish Creek Park Co. v. Village of Bayside*, 274 Wis. 533, 537, 80 N.W.2d 437 (1957) ("apportionment" is "the

duty of the legislature”); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (“[T]he apportionment task ... is primarily a ... legislative process.”).

The U.S. Constitution tasks “the Legislature” of each state with congressional redistricting. U.S. Const. art. I, §4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”). The Elections Clause “leav[es] in state legislatures the initial power to draw districts for federal elections,” while “permit[ing] Congress to ‘make or alter’ those districts if it wished.” *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality op.).

The Wisconsin Constitution likewise assigns redistricting to the Legislature. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶6, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). Article IV sets forth requirements for reapportioning the state senate and assembly districts after every census. Wis. Const. art. IV, §§3-5. As for the congressional districts, the Constitution today contains no standards. *Johnson I*, 2021 WI 87, ¶13. The 1848 Constitution apportioned the State’s first two congressional districts “until otherwise provided by law.” Wis. Const. art. XIV, §10 (1848) (repealed 1982).

From the beginning, the state and federal constitutions have assigned redistricting, an inherently political task, to the political branches. *See Rucho*, 588 U.S. at 697-99. The framers “entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely

these sorts of political and policy decisions, is preferable to any other.” *Jensen*, 2002 WI 13, ¶10.

This Court understood that division of power for the congressional districts in *Johnson*. It recognized the “law on the books” was the 2011 map. *Johnson I*, 2021 WI 87, ¶84 (Hagedorn, J., concurring). The Court did not redistrict anew as if it were the Legislature. The Court did only what was “necessary” to remedy the malapportionment of those existing 2011 districts. *Johnson II*, 2022 WI 14, ¶¶19, 52. For when a state court must remedy a legal defect in congressional districts, it “follow[s] the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature.” *Branch v. Smith*, 538 U.S. 254, 274 (2003) (cleaned up); see *White*, 412 U.S. at 795 (courts “honor state policies in the context of congressional reapportionment”). To do more would risk encroaching on the Legislature’s authority—made express in the U.S. Constitution—to make the political and policy choices inherent in redistricting.¹

b. Plaintiffs’ constitutional arguments ignore the clear and specific assignment of redistricting power to “the Legislature.”

¹ Again, *Clarke* is not to the contrary. *Supra* pp.23-24. This Court rejected that a “least-change approach” was required for proposed remedies in a follow-on constitutional challenge to the *statehouse* districts. 2023 WI 79, ¶¶61-63. This Court declined to disturb the congressional districts after *Clarke*. *Supra* p.15. For good reason—the federal Constitution contains extra constraints limiting the power of state courts over congressional districts, unlike *statehouse* districts. *Moore*, 600 U.S. at 34 (observing that state courts cannot use state law to subvert federal constitutional commands).

Rehashing the same arguments rejected in *Johnson*, Plaintiffs insist Article I, Sections 1 and 22 prohibit anti-competitive gerrymandering. Br.32-34. They do not. Section 1 “has nothing to say about partisan gerrymanders.” *Johnson I*, 2021 WI 87, ¶55. Its declaration that all people are “equally free” holds true “irrespective of how district lines are drawn,” as “[v]oters retain their freedom to choose among candidates.” *Id.* ¶¶54-55. “To fabricate a legal standard of partisan ‘fairness’ —or ‘competitiveness’ — would flout Section 22’s principles of “moderation” and “temperance.” *Id.* ¶62. “To construe Article I, Sections 1 ... or 22 as a reservoir of additional requirements would violate axiomatic principles of interpretation, while plunging this court into the political thicket lurking beyond its constitutional boundaries.” *Id.* ¶63 (citation omitted).

Plaintiffs’ “right to vote” theory fares no better. *See* Br.34-36. Voting is “subject to reasonable regulation by the legislature.” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949); *State v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910) (“subject to regulation like all other rights”). And it is the Legislature’s “constitutional power to say how, when and where [a qualified elector’s] ballot shall be cast,” “subject only to the limitations and restraints imposed by the [Wisconsin] constitution and the constitution and laws of the United States.” *Frederick*, 254 Wis. at 613, 615. Article IV imposes some limitations for statehouse districts. *Johnson I*, 2021 WI 87, ¶63. The federal Constitution and Voting Rights Act impose additional limitations. *See, e.g., Louisiana v. Callais*, 146 S. Ct. 1131 (2026). But none of those limitations purports to limit political effects of congressional

redistricting. See *Jensen*, 2002 WI 13, ¶10 (observing redistricting is “inherently political”). And citizens remain free to vote “[e]ven after the most severe partisan gerrymanders.” *Johnson I*, 2021 WI 87, ¶60.

2. History confirms redistricting is for the political branches.

Plaintiffs’ historical arguments answer the wrong question. The question is not whether “gerrymandering” was uttered by framers or politicians. The question is whether state courts were ever considered to be the appropriate branch of state government to resolve accusations of gerrymandering. No history suggests they were.

a. In the early colonies, executives apportioned. Jack P. Green, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689-1776* 204 (1963) (hereinafter, “Green”). Colonists were “troubled” by how governors used their power “to establish electoral districts and apportion representatives” to “influence and control” the people’s legislative representatives. Gordon S. Wood, *The Creation of the American Republic 1776-1787* 156-57 (1998 ed.). Lower houses insisted that districts should be “settled only by statute” and thus began to assume the apportionment power. Green 172.

“Partisan collisions” began immediately. Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 21 (2013) (hereinafter, “Engstrom”). In the colonies, Virginia county lines were changed to “secur[e] political advantage,” eastern Pennsylvania counties kept the fast-growing city of “Philadelphia separated from the county”

because it “threatened the political supremacy of the counties,” and the North Carolina governor “alter[ed] old and establish[ed] new precincts” for “his own political ends.” Elmer C. Griffith, *The Rise and Development of the Gerrymander* 25-29 (1907) (hereinafter, “Griffith”).

Against that backdrop, the federal framers chose a political solution for the politics of redistricting, not a judicial one. They “entrust[ed] districting to political entities.” *Rucho*, 588 U.S. at 701. They tasked “the Legislature” of each State to regulate congressional elections. U.S. Const. art. I, §4, cl. 1. They “entrusted to legislative discretion” any questions surrounding such elections. A. Hamilton, *Federalist* 61. The framers understood that state legislatures would, in Madison’s words, “sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices” and “mould their regulations as to favor the candidates they wished to succeed.” 2 Records of the Federal Convention of 1787, at 240-41. The check was Congress, not courts. The Framers gave Congress the power to “make or alter” any regulations of congressional elections. U.S. Const. art. I, §4, cl. 1.

After ratification, state legislatures continued to pursue political goals with single-member districts or at-large elections. Engstrom 22-24; *see* Griffith 47 (explaining it was “common practice in early politics” to use districts if “election by general ticket was unfavorable to the party in control of the legislature”). In New Jersey, for example, Federalists and Anti-Federalists tried to maximize their partisan advantage with at-large elections. Engstrom 27-28. Elsewhere, States used districts to advantage

political parties. In Virginia, George Washington and the Federalists accused Patrick Henry and the Anti-Federalists of manipulating district lines to prevent James Madison's election to the First Congress. Griffith 31-37. The New York legislature divided Westchester to advantage the Federalists. *Id.* at 42-43. The Connecticut legislature carved up New Haven "to secure two Jacksonian districts instead of one." *Id.* at 112-13. The moniker "gerrymandering" was born in 1812 when Massachusetts Governor Elbridge Gerry signed a bill carving state and congressional districts into "fantastic shapes," one of which resembled a salamander, to aid his party. *Id.* at 17-19, 74-77.

As the Elections Clause anticipates, Congress intervened. The Apportionment Act of 1842 required single-member "districts composed of contiguous territory," Act of June 25, 1842, ch. 47, 5 Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith 12.

In short, "[t]he Framers were aware of electoral districting problems," "considered what to do about them," and trusted Congress to "chec[k] and balanc[e]" state legislatures' power. *Rucho*, 588 U.S. at 699. There was never any suggestion that "courts had a role to play" in redistricting or "any indication that the Framers had ever heard of courts doing such a thing." *Id.*

b. In Wisconsin, the history points in the same direction. Nothing in the convention debates suggests courts had any role to play in policing the politics of districts. Plaintiffs' cited debate about gerrymandering, Br.37-38, was about using single-member legislative districts, mirroring what Congress had just required for congressional districts. Journal of the

Convention to Form a Constitution for the State of Wisconsin 384 (1848) (hereinafter, "Convention Journal") (Delegate Lakin observing that if single-member districts were "right" for "electing members of congress," it was "equally" so for "the election of members of the state legislature"). As for debates about the State's first two congressional districts, Br.38, delegates casually dismissed complaints of partisan unfairness. Delegate Rountree complained that dividing Wisconsin with an east-west line was "partial, and unjust," not "fair and equitable," and a "grand design" of "political considerations" to "secure two democratic districts." Convention Journal 564-66, 568. Delegate Chase responded that "both representatives should have districts bordering [Lake Michigan], and thus be interested in commerce," which "was the great interest of the state" and "needed the special interest of our representatives." *Id.* at 567. Delegates never suggested courts should resolve that dispute. Even Delegate Rountree understood it was left to "the people" to address it come "the apportionment" after the 1850 census. *Id.* And no recorded debate on Article I, Sections 1 or 22 or Article III suggests those provisions create a right to competitive districts or relate to redistricting at all.

For the next 100 years, this Court consciously avoided "judicial usurpation of the legislative function with respect to the apportionment." *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 485 (1932). This Court long understood that "the power to reapportion [is] vested by the constitution exclusively in the legislature," on which "the judicial department cannot encroach." *State ex rel. Broughton v. Zimmerman*, 261 Wis.

398, 410, 52 N.W.2d 903 (1952). When the Court declared districts unconstitutionally malapportioned in 1892, it declined to “suggest a plan for such apportionment” because it “disclaim[ed] any and all legislative functions.” *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 58 (1892); see also *State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 111, 23 N.W.2d 610 (1946) (maintaining “courts do not have jurisdiction” to redistrict).

Then came *Reynolds*, 377 U.S. 533, and *Wesberry v. Sanders*, 376 U.S. 1 (1964), concluding malapportionment claims were justiciable and requiring equal numbers of inhabitants in districts. Courts began offering judicial remedies for malapportionment, including in Wisconsin. See, e.g., *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964). Even then, this Court declined to modify districts without giving the political branches “further opportunity ... to enact a valid plan” because “[s]uch policy choices ... ought ... to be made through the legislative process.” *Id.* at 565. The Court imposed a plan only after the political branches again “failed to enact any legislative apportionment.” *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 606, 128 N.W.2d 16 (1964).

c. That history of malapportionment cases does not make Plaintiffs’ “anti-competitive gerrymandering” claims justiciable. *Contra* Br.40-42. In both *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 720 (1892),² and *Zimmerman*, 22 Wis. 2d at 564, the statehouse districts were

² Plaintiffs’ reliance on Justice Pinney’s concurring opinion is remarkable. He explained that there “must be clear” conflict with “express provisions of the constitution” to declare the plan void—not because the plan is, “in a general sense, opposed to the spirit, not expressed in words, but supposed to pervade the constitution.” 51 N.W. at 738

challenged not as “anti-competitive gerrymandering” but as *numerically* malapportioned. *Contra* Br.40-41. Adjudicating malapportionment claims is an objective endeavor with an “easily administrable standard” based on “three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts.” *Vieth*, 541 U.S. at 290 (plurality op.). Requiring *numerically* equal districts is simply a “matter of math.” *Rucho*, 588 U.S. at 708. Adjudicating whether there is a “lack of competition” in districts, conversely, turns on political prognostications and policy determinations unmoored from federal or state constitutional text. Plaintiffs’ claims present a “sea of imponderables” that “not even election experts can agree upon.” *Vieth*, 541 U.S. at 290 (plurality op.).

Nor do Plaintiffs’ cited cases say anything about “forbid[ding]” anti-competitive intent. *Contra* Br.27. As Justice Pinney explained in *Cunningham*, “improper motives or unconstitutional intentions of the legislative body” will *not* void a law. 51 N.W. at 738. Take *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1052 (1910), where this Court *upheld* the challenged law against accusations that it sought to “promote the supremacy of the [party] in power,” concluding “the extreme of legislative discretion was not overstepped.” The circuit court was not obligated to “cite” or “distinguish” these readily distinguishable cases, *contra* Br.27, in rejecting Plaintiffs’

(emphasis added). Plaintiffs’ argument that their cited constitutional provisions may not “explicitly mention anti-competitive gerrymandering” but “embody” “values” that “bar redistricting” that “stifl[es] competition” would have found no favor with him. Br.32-33.

meritless arguments. *See Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

For all of Plaintiffs' arguments about this Court's "aversion to" and "condemnations of anti-competitive practices," Br.42, they omit a more telling historical episode: *Seefeldt v. Zimmerman*. In 1972, this Court rejected a petition for original action challenging districts that "protected incumbents" and "strengthened the partisan advantages for the greatest number of incumbents, whether Democratic or Republican." A. Clarke Hagensick, "Wisconsin," in *Reapportionment Politics: The History of Redistricting in the 50 States* 351-52 (1981). The petition for original action challenged the districts as malapportioned and asked the Court "to secure fair state legislative representation" against the alleged "gerrymandering." Legis.App.9-11. Petitioners claimed the plan, "if not checked by the court, would enable the legislature to gerrymander legislative districts ... to protect incumbents' positions" and "to dicker with the relative strength of the political parties." Legis.App.18. They argued the "democratic standards enshrined in the Constitution" required the plan be "free of gerrymandering." Legis.App.21-22; *see* Legis.App.31 (alleging "obvious gerrymandering" outside Milwaukee). They asked "this Court to execute" a valid plan. Legis.App.26. The Court denied the petition. *See* Legis.App.33-34; *accord Seefeldt v. Zimmerman*, 55 Wis. 2d 766 (1972) (reproduced in Legis.App.35-36).

3. The Wisconsin Constitution does not pick between political philosophies for what is most “fair” in redistricting.

Plaintiffs ask the Court to impose their preferred vision of fairness, over many “different visions of fairness,” on all Wisconsinites. *Rucho*, 588 U.S. at 706-07. While “competitive” districts might be one voter’s desire, others might prefer a politically homogenous district, or an urban or rural district, or a most compact district that is agnostic to politics. *Id.* And while Plaintiffs believe the *sine qua non* for districts is a close “margin of victory” between Republicans and Democrats, Br.46-47, the Wisconsin Constitution does not pick sides in deciding what is the “fair” partisan division in districts, *Johnson I*, 2021 WI 87, ¶45. Why not a “proportionality” standard that allots each major party “its ‘appropriate’ share of ‘safe’ seats”? *Rucho*, 588 U.S. at 706. Why not a standard “measured by adherence to ‘traditional’ districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents”? *Id.* at 706-07. Why not more homogenous districts matching “the policy preferences of the median legislator and those of the median voter”? James A. Gardner, *What Is “Fair” Partisan Representation, and How Can It Be Constitutionalized?*, 90 Marq. L. Rev. 555, 563 (2007).

There is every reason to doubt Plaintiffs’ political preference for “competitive” districts is the best way to draw districts, let alone the constitutionally compelled way. Maximizing district-level competitiveness “promises to make the greatest number of voters *unhappy* with the outcome of the election.” Nathaniel Persily, *In Defense of Foxes Guarding Henhouses:*

The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649, 668 (2002) (hereinafter, “Persily”) (emphasis added). And it “could lead to a legislature wildly unrepresentative” of constituents’ political preferences. *Id.* “If all or most of the districts are competitive ... even a narrow statewide preference for either party would produce an overwhelming majority for the winning party” in a wave election year. *Bandemer*, 478 U.S. at 130 (plurality op.).

Nor will increased competitiveness necessarily “give voters greater choice.” *Contra* Br.25. Hypercompetitive districts force candidates to compete for “median” or “ideologically centrist voters who will cast tie-breaking votes.” Persily 668-69. A party may “have to change its platform so dramatically that it might disrupt continuity and coherence in party identity, thereby alienating its current constituency.” Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness*, 67 Cath. U. L. Rev. 229, 260 (2018). Targeting centrist voters “naturally draws candidates and parties toward converging ideological positions,” homogenizing the two parties and thus leaving voters with “less real ‘choice.’” Persily 669. That might be desirable for centrist voters, but not longtime Madison Democrats or Republicans up north. *See generally, e.g.,* Alan I. Abramowitz, *The Polarized American Electorate: The Rise of Partisan-Ideological Consistency and Its Consequences*, 137 Pol. Sci. Quarterly 645 (2022).

Plaintiffs’ desire for “legislative turnover,” Br.23, would also disadvantage the State’s voice in Congress. Plaintiffs would have this Court conclude that an advantage for incumbents is unconstitutional. Br.34.

Nothing in the Wisconsin Constitution suggests such a rule. Nor would it make sense. States have “a truly compelling interest in sending the most senior delegation to Washington that it can.” Persily 671. Congressional rules “put a substantial premium on seniority” such that “each Member’s already plentiful opportunities to distribute benefits to his constituents increase with the length of his tenure.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 922-23 (1995) (Thomas, J., dissenting). “Senior members can obtain choice committee appointments and chair slots” and “demand assignments that allow them to deliver benefits” that are “desired by the constituents.” Thad Kousser, *Term Limits and the Dismantling of State Legislative Professionalism* 100 (2005). A senior legislator’s experience “dealing with government ‘red tape’” and wielding “rules of parliamentary procedure to best advantage might provide benefits which a freshman legislator could not.” H. Rupert Theobald, *Equal Representation: A Study of Legislative and Congressional Apportionment in Wisconsin*, Wis. Blue Book 178 (1970). Simply put, “a state that threatens its incumbents threatens its own interests.” Persily 671.

Plaintiffs’ arguments about “non-responsiveness” or a “lack of accountability,” Br.16, are political debates, not judicial ones. And political scientists have rejected Plaintiffs’ assumptions that lack of competition leads to non-responsiveness.³ A district represented by a freshman Democrat for

³ See Andrew Gelman & Gary King, *Estimating the Electoral Consequences of Legislative Redistricting*, 85 J. Am. Stat. Ass’n 274, 282 (1990) (finding “Wisconsin’s responsiveness changes no more across redistricting than between any other two consecutive elections” and suggesting “redistricters could not reduce responsiveness any

one term and a freshman Republican the next can be “detrimental to good representation.” Antoine Yoshinaka & Chad Murphy, *The Paradox of Redistricting: How Partisan Mapmakers Foster Competition but Disrupt Representation*, 64(2) Pol. Rsch. Quarterly 435, 444 (2011). That “instability can make it more difficult for representatives to act in the interests of the represented, in a manner responsive to them.” *Id.* (cleaned up). Long-term representatives develop relationships with constituents, better “understand the unique problems of their districts,” and can “pursue legislation that remedies those problems.” Persily 671.

Whatever one makes of Plaintiffs’ arguments about the virtue of competitive districts or political scientists’ warnings about the same, the Wisconsin Constitution does not permit the judiciary to pick sides. *Johnson I*, 2021 WI 87, ¶45. It would be lasting and serious error for this Court to cement Plaintiffs’ views about competitiveness and incumbents into a constitutional prescription for all Wisconsinites. It is not for this Court to dictate “the ‘correct’ theories of democratic representation” or “the ‘best’ electoral systems for securing truly ‘representative’ government.” *Holder v. Hall*, 512 U.S. 874, 913 (1994) (Thomas, J., concurring in judgment). If

further due to the geographic pattern of voters in the state”); Stephen Ansolabehere & Shiro Kuriwaki, *Congressional Representation: Accountability from the Constituent’s Perspective*, 66 Am. J. Pol. Sci. 123, 137-38 (2022) (concluding constituents “exert electoral control” and thus “theories of representational failure cannot rely on the premise that individual voters are unable to hold legislators accountable”); Jamie L. Carson et al., *The Electoral Costs of Party Loyalty in Congress*, 54 Am. J. Pol. Sci. 598, 614 (2010) (finding “legislators with a record of lockstep, partisan voting were most likely to suffer electoral losses in the subsequent election”); Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members’ Voting*, 96 Am. Pol. Sci. Rev. 127, 127 (2002) (finding “members are indeed accountable for their legislative voting”).

Plaintiffs want districts to disfavor incumbents, the remedy “is properly pursued within the political realm not in courts of law.” *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶28, 387 Wis. 2d 511, 929 N.W.2d 209.

4. The Wisconsin Constitution provides no judicially manageable standard for assessing competitiveness.

a. Plaintiffs’ desire for more competition in congressional elections cannot be “judged in terms of simple arithmetic.” *Fortson v. Dorsey*, 379 U.S. 433, 440 (1965) (Harlan, J., concurring). Courts cannot “even begin to answer the determinative question”: “How much” anti-competitiveness “is too much?” *Rucho*, 588 U.S. at 707. “[H]ow close does the split need to be for the district to be considered competitive?” *Id.* at 708. Must all districts be 50-50, 60-40, something else? Or just some districts? Should that quest for just enough Republicans and just enough Democrats in a district supersede traditional districting criteria, such as compactness? Or “how much deviation from [traditional] criteria is constitutionally acceptable and how should mapmakers prioritize competing criteria?” *Id.* at 707. Perhaps this Court ought to “‘reverse gerrymander’ other parts of the State to counteract ‘natural’ gerrymandering,” where Democrats tend to concentrate in urban areas? *Id.* at 707-08.

Such questions are nonjusticiable political questions. They “are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories.” *Hall*, 512 U.S. at 901-02 (Thomas, J., concurring in judgment). The Wisconsin Constitution provides no discernable legal standards for deciding how “competitive”

any district must be. *See Johnson I*, 2021 WI 87, ¶44. There is no principal that would “meaningfully constrain the discretion of courts.” *Rucho*, 588 U.S. at 706; *see Gaffney*, 412 U.S. at 749 (cautioning against removing redistricting from “legislative hands,” such that courts “must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan”).

b. Plaintiffs propose an “intent-and-effect” standard, Br.45-47, but giving their test a name does not make it justiciable. *See Rucho*, 588 U.S. at 710-13 (deeming it nonjusticiable); *Vieth*, 541 U.S. at 284-90 (plurality op.) (same). Plaintiffs provide no baseline to determine whether districts are “artificially uncompetitive,” Br.11, “materially less competitive,” Br.23, or sufficiently “more competitive,” Br.11, 18. Plaintiffs concede “there is no arithmetical ideal of competitiveness for plans or districts.” Br.26. Plaintiffs say courts need only look at the “margin of victory.” Br.16-17, 26-27. But what margin of victory is too great in the overwhelmingly Democratic Madison area or the largely Republican northern half of the State?

Plaintiffs say courts can compare the margin of victory for the existing districts to computer-drawn simulations or other “neutral” maps. Br.23-26, 46. As in other (nonjusticiable) gerrymandering cases, Plaintiffs would have courts measure competitiveness with “margin[s] of victory” — *i.e.*, with past election results and predicted future election results. *See, e.g.*, Br.46-47, App.68, 71. They would have courts compare how candidates would fare in the existing congressional districts versus some politically “neutral”

alternative map. *See* Br.18, 23; App.52, 66. They say the “crux” of their theory is showing “that competition is lower than under a neutral map.” Br.23; *see* Br.24 (comparing “competitiveness to lawful alternatives”); Br.26 (“competitiveness can be determined only relative to lawful alternative maps”).

But what’s “neutral” in Wisconsin, Br.23, is elusive and debatable. *See Johnson I*, 2021 WI 87, ¶¶43, 56. And Plaintiffs’ solution—measure competitiveness with past election results—requires courts to “indulge a fiction—that partisan affiliation is permanent and invariably dictates how a voter casts every ballot.” *Id.* ¶56. Political preference is not some immutable characteristic. *Id.*

Plaintiffs can debate the fairness of Wisconsin’s districts all they want in university classrooms or at kitchen tables. But the solutions they pose are not judicially manageable. They do not account for the fact that voters cast ballots for people, not political parties. *Bandemer*, 478 U.S. at 154 (O’Connor, J., concurring). “Experience proves that accurately predicting electoral outcomes is not so simple,” as “[e]ven the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change.” *Rucho*, 588 U.S. at 712. Congressional elections can have good and bad candidates, well-funded and unfunded candidates, or upright and scandal-stricken candidates. *See Vieth*, 541 U.S. at 287 (plurality op.) (“We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold.”). There are once-in-a-

generation candidates like President Barack Obama and Senator Tammy Baldwin; their “margin of victory” should have no bearing on whether a first-time Democratic candidate with zero funding had a competitive enough race. Plaintiffs do not account for the one-third of Wisconsinites who identify as independents, *Johnson I*, 2021 WI 87, ¶43, and who might vote for the experienced Republican candidate in one election year and the charismatic Democratic candidate in the next. Or those who split their tickets, voting Democrat for U.S. Senate but Republican for other races. Emily Roberts, *Wisconsin’s Split Ticket: Republican President, Democratic Senator*, WSAW (Nov. 7, 2024), <https://perma.cc/X2Y2-XF7A>.

Even if courts could reliably count Republicans and Democrats (and ignore independents), how should courts account for the reality that Wisconsin is not the “mythical State with voters of every political identity distributed in an absolutely gray uniformity.” *Vieth*, 541 U.S. at 343 (Souter, J., dissenting). What “margin of victory,” Br.27, is too big for the Wisconsin Constitution for overly Republican areas like the Northwoods or overly Democratic areas like Madison? See *Johnson I*, 2021 WI 87, ¶48. Must congressional districts stretch across the State to capture enough Republicans or enough Democrats, jettisoning traditional districting criteria like compactness or communities with shared interests? The Wisconsin Constitution provides no standards for courts to weigh these considerations. It says nothing about congressional districts at all. *Id.* ¶13.

5. Authorities from other States with other state constitutions are inapposite.

Plaintiffs say other state courts require competitive districts, so this Court should too. Br.42-45. But Wisconsin's Constitution is not Florida's or Ohio's. The question here is not whether Wisconsinites *could* amend their constitution to impose a justiciable standard for competitive districts. *Contra* Br.42. The question is whether the Wisconsin Constitution does today. It does not. *Supra* II.B.1-4.

Plaintiffs omit the real “nationwide trend.” Br.45. Other States have *amended* their constitutions to impose new districting requirements. Cited decisions from New York, Florida, Arizona, Colorado, and Ohio all concern recent constitutional amendments that specifically address incumbents or competitiveness.⁴ Like residents of those States, if Plaintiffs want more competitive districts, their solution lies in a constitutional amendment or congressional legislation, not a court case.

Plaintiffs' other cited decisions undermine their claim. *See* Br.44-45. In *Harper v. Hall*, 384 N.C. 292, 300, 886 S.E.2d 393 (2023), the North Carolina

⁴ *See* N.Y. Const. art. III, §4(c)(5) (prohibiting districts “drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties”); Fla. Const. art. III, §21(a) (prohibiting plans “drawn with the intent to favor or disfavor a political party or an incumbent”); Ariz. Const. art. IV, Pt. 2 §1(14)F, (15) (providing “competitive districts should be favored” and prohibiting consideration of “[p]arty registration and voting history data” and “places of residence of incumbents or candidates”); Colo. Const. art. V, §48.1(3)(a), (d), (4)(a) (requiring commission to “maximize the number of politically competitive districts,” measured by “past election results” and “party registration data,” and prohibiting maps drawn to “protect one or more incumbent members ... or any political party”); Ohio Const., art. XIX, §1(C)(3)(a) (prohibiting a plan “that unduly favors or disfavors a political party or its incumbents”).

Supreme Court held “partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution.” In *Gonzalez v. State Apportionment Commission*, the court *rejected* the plaintiffs’ challenge under a constitutional provision guaranteeing the right “to alter or reform” government, holding it provides no “cause of action for voters who are displeased with the reigning political tides.” 428 N.J. Super. 333, 370-71, 53 A.3d 1230 (App. Div. 2012). *Szeliga v. Lamone* held a plan unconstitutional under the Maryland Constitution’s “Free Elections Clause” because it “subordinate[d] constitutional criteria”—“compactness” and “due regard” to “boundaries of political subdivisions”—“to political considerations.” 2022 WL 2132194, at *43 (Md. Cir. Ct. Mar. 25), App.550. The Alaska Supreme Court recognized a partisan gerrymandering claim based on “[a]mple evidence” from conventions that “reflect considerable focus on limiting gerrymandering.” *In re 2021 Redistricting Cases*, 528 P.3d 40, 53, 56 (Alaska 2023).

Compare all that to here. Wisconsin has no constitutional provision addressing partisanship, incumbents, or competitiveness in redistricting. It has no free elections clause. Delegates to Wisconsin’s constitutional convention did not seek to maximize districts’ competitiveness; they casually *dismissed* accusations of partisanship regarding the State’s first two congressional districts. *Supra* II.B.2.b. The “authority” to update the Wisconsin Constitution “has not been given” to this Court. *Wis. Just. Initiative*, 2023 WI 38, ¶18. Such “policy choices” are left “to the people” for them “to govern themselves.” *Id.* ¶¶21, 28.

III. Plaintiffs invite this Court to violate the federal Elections Clause.

The U.S. Constitution entrusts “the Legislature” of each state to make political choices inherent in congressional redistricting. U.S. Const. art. I, §4, cl. 1. When a congressional redistricting dispute comes before state courts—for instance, numerical malapportionment or racial gerrymandering claims—they “do not have free rein” to redistrict anew. *Moore*, 600 U.S. at 34. So as not to transgress the Elections Clause, state courts must “not transgress the ordinary bounds of judicial review.” *Id.* at 36. This Court abided by that line in *Johnson* when it deferred to the Legislature’s 2011 congressional districts and made only necessary changes to remedy the unconstitutional malapportionment. *Supra* p.30.

Unlike *Johnson*, Plaintiffs here asked the circuit court to redistrict anew. They insisted the court strike a new political balance to ensure “partisan fairness.” App.54, 76. And they asked for that redraw despite *Johnson I*’s interpretation of relevant constitutional provisions and despite *Johnson II*’s holding that the existing congressional districts comply with all state and federal law. *Johnson I*, 2021 WI 87, ¶¶39-63; *Johnson II*, 2022 WI 14, ¶25. It is hard to imagine a more unusual judicial proceeding or a better opportunity for the U.S. Supreme Court to clarify when a state court “exceed[s] the bounds of ordinary judicial review.” *Moore*, 600 U.S. at 37.

A. Start with the highly unusual posture of this case. Plaintiffs challenge the *Johnson II* districts for looking *too much* like the districts last enacted by the Legislature. App.67. But this Court already held those districts “comply with all relevant state and federal laws” before ordering

the Elections Commission to use them. *Johnson II*, 2022 WI 14, ¶¶25, 52. That the districts made only necessary changes to the 2011 districts is a feature, not a bug, given the Elections Clause’s assignment of redistricting authority to “the Legislature.” *Supra* p.30; *see also Abrams v. Johnson*, 521 U.S. 74, 79 (1997) (“When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan”); *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (per curiam) (court-ordered plan should not change “more than [is] necessary to meet the specific constitutional violations involved”).

Undeterred, Plaintiffs asked an inferior court to declare the *Johnson II* districts unconstitutional. App.76. The circuit court was powerless to enter such relief. *Supra* I. And while this Court may make exceptions for such collateral attacks and remedial rules involving the statehouse districts, *see Clarke*, 2023 WI 79, ¶¶51-54, 61-63, the Court’s power in this case is constrained by the federal Elections Clause. For congressional districts, state courts do not have “free rein.” *Moore*, 600 U.S. at 36-37.

There has been no intervening change to the Wisconsin Constitution and no intervening census that could explain abandoning the *Johnson II* injunction. Claims of political unfairness remain nonjusticiable and not cognizable. *Johnson I*, 2021 WI 87, ¶¶8, 39-63; *supra* II.B. All that has changed is this Court’s membership, which is no basis for this Court to conclude the Wisconsin Constitution *now* authorizes the judiciary to referee the political makeup of districts even if they could not before. *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257.

Redrawing districts to create “partisan fairness,” App.76—a political exercise—would make this court “no more than a super-legislature,” *Flynn v. Dep’t of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998), arrogating the actual Legislature’s congressional redistricting power, *Moore*, 600 U.S. at 36-37. Abstaining is especially warranted here, given campaign statements that districts were “wrong”⁵ and “need[ed] to change”⁶ so that “Democrats” could “win two additional US House seats.”⁷

Even if this Court were to take the extraordinary step of overruling *Johnson I*’s conclusion that the Wisconsin Constitution contains “no plausible grant of authority” for courts to examine the political makeup of districts, 2021 WI 87, ¶52, there’s still no basis for declaring the *Johnson II* districts unconstitutional. All that is before the Court are “mere allegation[s]” in a complaint, which “d[o] not resolve the question whether [Plaintiffs are], on the merits, entitled to relief.” *Riedy v. Sperry*, 83 Wis. 2d 158, 165, 265 N.W.2d 475 (1978); *see also Tews v. NHI, LLC*, 2010 WI 137, ¶82, 330 Wis. 2d 389, 793 N.W.2d 860 (emphasizing a complaint “is not evidentiary”); *Leszczynski v. Surges*, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966) (noting allegations in pleadings “are ineffectual as proof”).

B. Entertaining Plaintiffs’ political dispute would abandon the ordinary trappings of judicial proceedings. It would require overlooking

⁵ Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics*, at 29:40-29:49, YouTube (Mar. 21, 2023), <https://bit.ly/3HAtZtv>.

⁶ Matt Mencarini, *How could the 2023 Wisconsin Supreme Court election impact medical malpractice lawsuits?*, PBS Wis. (Mar. 31, 2023), <https://perma.cc/V87K-LC4C>.

⁷ Order App’x A, *Felton*, No. 2025AP999-OA (Wis. May 15, 2025) (Grassl Bradley, J., dissenting).

longstanding common-law doctrines like laches or preclusion, exceeding “the bounds of ordinary judicial review.” *Moore*, 600 U.S. at 37.

1. Laches bars Plaintiffs’ late-breaking action. Having waited more than 3 years after *Johnson II* and 14 years after Act 44, Plaintiffs “unreasonably delayed in bringing the suit,” *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101, flouting their “special duty to bring” election-related “claims in a timely manner,” *Trump v. Biden*, 2020 WI 91, ¶30, 394 Wis. 2d 629, 951 N.W.2d 568. Their decision to “sleep on their rights” is unreasonable and unexplained. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587. No party could have anticipated Plaintiffs’ years-delayed claims in circuit court, especially when they told this Court a year ago that only it has the power to revisit the *Johnson II* injunction. WBLD Mot. to Intervene Ex. ¶16; see *Brennan*, 2020 WI 69, ¶18. And Plaintiffs’ untimeliness prejudices everyone. If Plaintiffs prevail, redistricting will begin anew, only to do so again after the 2030 census, “creating instability and dislocation in the electoral system” and “great financial and logistical burdens.” *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990). Voters who “have come to know their districts and candidates ... will be confused by change.” *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999), *aff’d sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); accord *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). There’s no justification for Plaintiffs’ years-delayed collateral attack.

2. Plaintiffs’ suit also flouts elementary rules disfavoring repeat litigation and prohibiting collateral attacks on final judgment. *Johnson II*

settled the congressional districts for the decade. Every branch of the Wisconsin government along with many interested Wisconsinites all participated. See *Johnson I*, 2021 WI 87, ¶6. That original action was “by definition, publici juris, implicating the sovereign rights of the people of this state.” *Jensen*, 2002 WI 13, ¶17. But Plaintiffs now return to this Court, asserting harms to “all voters” in Wisconsin. Br.11, 16, 24.

Allowing this collateral attack on the *Johnson II* districts would “disrupt the finality of prior judgments,” “undermine confidence in the integrity of our procedures,” and “delay and impair the orderly administration of justice.” *Oneida Cnty. Dep’t of Soc. Servs. v. Nicole W.*, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652. An “order or judgment,” even if Plaintiffs think it “erroneous,” “is not subject to collateral attack.” *Stimson v. Munsen*, 251 Wis. 41, 44, 27 N.W.2d 896 (1947). The *Johnson II* judgment is final. See *Kriesel v. Kriesel*, 35 Wis. 2d 134, 139, 150 N.W.2d 416 (1967) (recognizing the “settled law that a judgment of a court which had jurisdiction ... cannot be impeached and is immune from and not subject to collateral attack,” even if “patently erroneous”). The Wisconsin Constitution limits the Legislature to “only one” redistricting “within the same census period.” *State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 312, 63 N.W.2d 52 (1954). The same goes for Plaintiffs’ desire for repeat redistricting by this Court.

3. Finally, Plaintiffs not only assume they will prevail but also assume this case can proceed at lightning speed on remand. Even though the circuit court dismissed their complaint, they say their case can go to trial in April

2027 to obtain “a new map for the 2028 congressional election.” Br.21. That timeframe is outrageous for factual issues that Plaintiffs agree would require extensive fact and expert discovery, including expert reports, depositions, and rebuttal reports, and a multi-week “trial on liability,” to be followed by a similarly extensive “remedial phase.” App.117, 130-32; *see, e.g., Singleton v. Allen*, ___ F. Supp. 3d ___, 2026 WL 1469518, at *8 (N.D. Ala. May 26) (noting 11 trial days with live testimony from 23 witnesses including 13 experts, designated testimony from 28 more witnesses, 790 exhibits, and 840 pages of post-trial briefing). And as Plaintiffs recognize, this case “will be appealed,” App.121, including to the U.S. Supreme Court should there be a violation of the Elections Clause.

* * *

Taken together, these departures from ordinary judicial review would confirm that Plaintiffs’ suit is a political endeavor, not a judicial one. Granting relief would accordingly “transgress the ordinary bounds of judicial review,” “arrogate ... power vested in state legislatures to regulate federal elections,” and run afoul of the federal Elections Clause. *Moore*, 600 U.S. at 36; *accord id.* at 38 (Kavanaugh, J., concurring).

CONCLUSION

The Court should affirm the dismissal of Plaintiffs’ amended complaint.

Dated: August 6, 2026

Respectfully submitted,

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CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c). Excluding the portions of this brief that may be excluded, the length of this brief is 10,954 words as calculated by Microsoft Word.

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with Wis. Stat. § 809.19(3)(b).

Dated: August 6, 2026

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