Appeal No. 2026AP001008

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 Circuit Court for Dane County,
Three-Judge Panel pursuant to Wis. Stat. § 751.035,
The Honorable David Conway, Michael Moran, and Patricia Baker,
Presiding
Circuit Court Case No. 2025CV2252

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Introduction

The briefs of the Legislature, Republican Congressmen, and Johnson Intervenors (collectively, Intervenors) boil down to a few dubious propositions:

- This Court's opinion in *Johnson v. WEC*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*), is a super-precedent whose dicta must be assiduously followed—and even extended to issues the Court scarcely contemplated.
- The right way to analyze constitutional law is to treat evidentiary sources as narrowly as possible and to overlook the broader principles they embody.
- An anti-competitive gerrymandering claim necessarily seeks either maximal competition or an indeterminate level of it.
- This case is procedurally flawed despite being brought under the very statute the Legislature enacted for redistricting disputes.
- A decision in favor of Plaintiffs-Appellants (WBLD) based on standard interpretive tools would somehow violate the federal Elections Clause.

Each point is wrong. To start, *Johnson I* was nearly silent about anti-competitive gerrymandering, which is a distinct claim from partisan gerrymandering. The opinion's lone reference to "a 'bipartisan' gerrymander" suggested that such a plan would be ***unlawful*** because it would "obliterate[e] … criteria mandated by … the Wisconsin Constitution." *Id.*, ¶48. *Johnson I* did comment on partisan gerrymandering, but this Court twice confirmed in *Clarke v. WEC* that those musings in dicta left the claim's status "unresolved." 2023 WI 79, ¶7, 410 Wis. 2d 1, 998 N.W.2d 370; 2023 WI 70, 409 Wis. 2d 372, 375, 995 N.W.2d 779. And if *Johnson I* does impede the recognition of an anti-

competitive gerrymandering claim, the Court should overrule the decision in part. After *Clarke*, little remains of it anyway.

Next, this Court has repeatedly rejected Intervenors' crabbed approach to constitutional law. Litigants must "appreciate the far-reaching purpose of the general constitutional declarations, the necessity … of a broad, rather than strict construction of those general terms." *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 520, 107 N.W. 500 (1906). At the proper level of generality, constitutional text, history, and precedent yield an anti-entrenchment principle irreconcilable with anti-competitive gerrymandering. The practice renders "the consent of the governed" irrelevant to politicians ensconced in their seats. Wis. Const. art. I, § 1. It contradicts the core reason the Constitution was adopted: to ensure that "every department of the government will be held accountable to the people." The Movement for Statehood, 1845–1846, at 68 (Milo M. Quaife ed., 1918). And this Court has condemned legislators "perpetuat[ing] their ascendency and power," specifically in the redistricting context. *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 500, 51 N.W. 724 (1892) (Pinney, J., concurring).

With respect to manageability, Intervenors misrepresent WBLD's claim. The claim asks for neither maximal competition nor a court's preferred level of it. Instead, the claim seeks—and uses as a baseline—the level of competition that naturally emerges when all applicable redistricting criteria are satisfied. Once this point is grasped, most of Intervenors' objections melt away. WBLD's claim wouldn't require tossup districts in places like Madison or the Northwoods where they wouldn't arise organically. Nor would WBLD's claim allow judges to

decide how much competition is appropriate. The state's own criteria and geography would set the benchmark.

Lastly, there are no other obstacles to reversing the circuit court and remanding for further proceedings. The Legislature's recently enacted statute for redistricting challenges, Wis. Stat. § 751.035, is a proper vehicle for this suit. Under this law, the circuit court had authority to recognize WBLD's claim and grant at least declaratory relief. Even if that court lacked such power, this Court indisputably possesses it. As in *Clarke*, laches is inapplicable because WBLD waited no longer than many redistricting litigants and will be injured anew by each future election. And what's left of the "independent state legislature" doctrine after *Moore v. Harper*, 600 U.S. 1 (2023), wouldn't be infringed by a decision using standard interpretive tools. That doctrine is especially inapt here since Wisconsin's congressional plan wasn't legislatively adopted but instead was proposed by the Governor, opposed by the same Intervenors who now defend it, and chosen by this Court.

Argument

I. *Johnson I* does not bar recognizing WBLD's claim.

Johnson I purported to hold that partisan gerrymandering claims are nonjusticiable, partly because Article IV of Wisconsin's Constitution doesn't explicitly authorize these claims. 2021 WI 87, ¶¶39–63. For three reasons, the opinion is no hurdle to recognizing WBLD's anti-competitive gerrymandering claim.

First, partisan and anti-competitive gerrymandering are distinct theories in every sense: they capture different harms, are enforced by different standards, and call for different remedies. (Pls. Br. 22–28) Take

a four-four Wisconsin congressional map deliberately crafted so each incumbent wins by a landslide. This map allocates seats proportionally to the major parties and is arguably the opposite of a partisan gerrymander. Yet it's a quintessential anti-competitive gerrymander because it intentionally and severely inhibits competition.

In its sole mention of anti-competitive gerrymandering, *Johnson I* ***distinguished*** it from partisan gerrymandering. If prevented from partisan gerrymandering, "the two dominant parties [might] create a 'bipartisan' gerrymander" whose "resulting districts may not be politically competitive." 2021 WI 87, ¶48. In *Clarke*, the Legislature's expert also understood what Intervenors now profess not to: that "a count of competitive districts" is "not really a measure of fairness to parties at all." Leg. Resp. Remedial Br. App.19a, *Clarke*, No. 2023AP001399-OA (Wis. Jan. 22, 2024) (*Clarke* Leg. Resp. App.).

Second, not only did *Johnson I* barely address anti-competitive gerrymandering, but the opinion's comments about partisan gerrymandering were dicta. True, these remarks were ***styled*** as a holding, but this label is inaccurate since "nobody argue[d] that [the Court] should strike down any existing map on the basis that it is an extreme partisan gerrymander." 2021 WI 87, ¶103 (Dallet, J., dissenting). "Without an excessive partisan-gerrymandering claim before [it]," the Court's discussion of this issue was "an advisory opinion" entitled to no precedential weight. *Id.* That's exactly why *Clarke* twice clarified that the legal status of partisan gerrymandering claims remains "unresolved." 2023 WI 79, ¶7; 2023 WI 70, 409 Wis. 2d at 375. Intervenors mostly ignore these statements, which can't be squared with their assertion that *Johnson I* is binding here.

Third, *Johnson I* erred in describing Article IV as "the exclusive repository of state constitutional limits on redistricting." 2021 WI 87, ¶63. In his concurrence, Justice Hagedorn reserved the question of "whether other provisions of the Wisconsin Constitution have anything to say about congressional districts." *Id.*, ¶87 n.18. So this description was not a majority holding but only a lead opinion. The description also clashes with the Court's earlier (unanimous) rulings. In *State ex rel. Sonneborn v. Sylvester*, the Court struck down malapportioned districts for county boards of supervisors because they "violate[d] … Art. 1, Sec. 1 of the Wisconsin constitution." 26 Wis. 2d 43, 60, 132 N.W.2d 249 (1965). In *Jensen v. Wisconsin Elections Board*, the Court reiterated that "redistricting litigation typically presents … state constitutional questions under the applicable provisions of the state charter," which include "Wis. Const. art. I, § 1." 2002 WI 13, ¶4 n.1, 249 Wis. 2d 706, 639 N.W.2d 537. Perhaps because of these cases, Intervenors concede that, contrary to *Johnson I*'s lead opinion, Article I, Section 1 does apply to redistricting. (Cong. Br. 35 ("Our Constitution imposes … requirements on congressional maps … under Article I, Section 1."))

Johnson I therefore doesn't bar recognizing WBLD's claim. But if the Court disagrees, it should abrogate any conflicting portions of the opinion. Two years after *Johnson I*, *Clarke* held that "partisan impact" must be considered "when evaluating remedial maps." 2023 WI 79, ¶69. This (genuine) holding "undermine[s] the rationale behind [the earlier] decision," *State v. Young*, 2006 WI 98, ¶51 n.16, 294 Wis. 2d 1, 717 N.W.2d 729, which was that the Court should "***not*** consider the partisan makeup of districts" when assessing potential remedies, 2021 WI 87, ¶81 (emphasis added). After *Clarke*, *Johnson I* is also "detrimental to

coherence and consistency in the law" with respect to partisanship and redistricting. *Young*, 2006 WI 98, ¶51 n.16. The opinion is "unsound in principle" as well, *id.*, as evinced by (among other flaws) its error as to Article IV.

II. Standard tools of constitutional interpretation support recognizing WBLD's claim.

Since *Johnson I* doesn't preclude WBLD's claim, the question is whether standard interpretive tools support it. They do. Constitutional text, history, and precedent combine to form a potent anti-entrenchment principle incompatible with anti-competitive gerrymandering. (Pls. Br. 32–45) Intervenors resist this conclusion by approaching constitutional law improperly. They systematically construe sources narrowly and in isolation and thereby convert "the general declared purposes of the Constitution" into "mere embellishments" and "glittering generalities" that end up "signifying nothing." *Milwaukee Med. Coll.*, 127 Wis. at 520 (internal quotation marks omitted).

Intervenors also rely heavily on federal legal materials and the experiences of other states. But this evidence has little bearing on whether ***Wisconsin's*** Constitution forbids anti-competitive gerrymandering. As Justice Smith wrote in a foundational case: "The people of other states made [their] constitutions … Let them construe theirs—let us construe, and stand by ours." *Att'y Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, 758 (1855).

A. *Text*. WBLD's claim is rooted in three provisions of Wisconsin's Constitution. The government no longer "deriv[es] its just powers from the consent of the governed" when anti-competitive gerrymandering shields legislators from electoral accountability. Wis. Const. art. I, § 1.

In this situation, the "suffrage" protected by Article III becomes pointless, *id.* art. III, and "[t]he blessings of a free government," *id.* art. I, § 22, can't be secured through elections with preordained outcomes. (Pls. Br. 32–36)

Intervenors mainly contend that these provisions don't explicitly refer to redistricting. Of course not: "Constitutions deal with general principles and policies, and do not usually descend to a specification of particulars." *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8*, 76 Wis. 177, 199, 44 N.W. 967 (1890). Additionally, as noted, Intervenors admit that Article I, Section 1 ***does*** constrain redistricting. (Cong. Br. 35, 38–39) So there's no disagreement about the applicability of this provision, at least. Intervenors further observe that the Constitution authorizes the Legislature to redistrict. So it does—but "our Declaration of Rights establishes limitations or restrictions" on all powers conferred to the Legislature. *Jacobs v. Major*, 139 Wis. 2d 492, 507, 407 N.W.2d 832 (1987). And Intervenors maintain that the franchise can't be infringed by policies (like redistricting abuses) that don't directly regulate voting. This Court rejected this position long ago, holding that Article III ***is*** violated by electoral rules that afford candidates "less opportunity for … competition for the favor of voters." *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 23, 128 N.W. 1041 (1910).

B. ***History***. WBLD's claim is considerably bolstered by the Wisconsin Constitution's drafting history, which demonstrates that the charter's authors intended to thwart gerrymandering. The history also shows that one of the Constitution's overarching principles is preventing officeholder entrenchment by promoting competition and electoral accountability. (Pls. Br. 36–40) As the Select Joint Committee on State

Government put it (evoking Article I, Section 1), consistent with the "maxim that all good governments must derive their just powers from the consent of the governed," no "department[]" would be "beyond the reach of the ballot box," and "[a]n immediate responsibility of the government to the people [would be] the true safeguard of the people's rights." The Movement for Statehood, 1845–1846, *supra*, at 67.

Intervenors say the framers objected only to partisan (not to anti-competitive) gerrymandering. In fact, they denounced both forms of redistricting wrongdoing. They conceived of gerrymandering as, among other things, "keeping political power in the same hands for such long periods [through] ill means." The Struggle over Ratification, 1846–1847, at 438 (Milo M. Quaife ed., 1920) (*Racine Advocate*). John Rountree also condemned as gerrymandered a proposed congressional district that unnecessarily had "so heavy and decided a [Democratic] party majority." Journal of the Convention to Form a Constitution for the State of Wisconsin 566 (1848).

Intervenors point out that the convention ultimately adopted this district. True enough, but not because anyone defended anti-competitive gerrymandering. Rather, delegates rebutted Rountree by arguing that the district aimed not to entrench Democrats but to achieve population equality and to "border[] on the lake," which "was the great interest of the state." *Id.* at 567 (Warren Chase). What's more, within less than a year, this safe Democratic seat was scrapped in favor of a more competitive congressional map that enabled two non-Democrats to win close races. (Pls. Br. 38)

As for Intervenors' complaint that the Constitution's drafting history doesn't mention courts policing redistricting, the absence of

statements precisely tailored to this litigation should hardly be surprising. The framers also did expect the "judicial … branch of government" to "void" unconstitutional "enactment[s] of the legislature." Journal of the Convention, *supra*, at 122 (George Lakin). And since this Court's first redistricting case, it has grasped that, "[i]f the remedy for these great public wrongs cannot be found in this court, it exists nowhere." *Cunningham*, 81 Wis. at 483. After all, "[i]t would be idle and useless to recommit such an apportionment to the voluntary action of the body that made it." *Id.* at 483–84.

C. *Precedent*. This Court's decisions in both redistricting and other cases further support recognizing WBLD's claim. The plans the Court struck down in *Cunningham* were anti-competitive gerrymanders that "perpetuate[d] [Democrats'] ascendency and power," *id.* at 500 (Pinney, J., concurring), and "desire[d] to preserve the political status quo," *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 566, 126 N.W.2d 551 (1964). Outside redistricting, the Court has decried the entrenchment of elected officials who "perpetuat[e] [themselves] in office." *State ex rel. Pluntz v. Johnson*, 176 Wis. 107, 116, 186 N.W. 729 (1922). And beyond Wisconsin, courts in several states have recognized, and capably adjudicated, anti-competitive gerrymandering claims. (Pls. Br. 40–45)

Intervenors note that the plans in *Cunningham* weren't nullified ***because*** they were anti-competitive gerrymanders. That's correct, but the Court's aversion to "the pernicious methods of gerrymandering" is what drew it into the redistricting thicket. *Cunningham*, 81 Wis. at 513 (Pinney, J., concurring); *see also State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 170, 53 N.W. 35 (1892) (Winslow, J., dissenting) (majority

sought to curb "the evil of gerrymandering"). Intervenors also assert that Justice Pinney would have opposed WBLD's claim because it isn't grounded in Article IV. Hardly. As Justice Pinney wished, the claim alleges violations of "the express provisions of the constitution and those limitations … implied from it": Article I, Sections 1 and 22, and Article III. *Cunningham*, 81 Wis. at 509 (Pinney, J., concurring).

Intervenors cite a 1972 denial of a petition for an original action, but it's unclear why. Only a lawyer's letter about the petition—not the petition itself or its supporting brief—alluded to anti-competitive gerrymandering. (Leg. App.18) And the bare majority that denied the petition did so not because anti-competitive gerrymandering is constitutional but because "the petition raises questions of fact." (Leg. App.34) Factual questions are inappropriate for an original action—but perfectly suited to a case like this.

Lastly, with respect to non-Wisconsin opinions, only some involved constitutional provisions specifically addressing competition or incumbency. Others ruled in favor of plaintiffs based on general language about equal protection, free speech and association, and free and equal elections. *See, e.g.*, *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 92–93 (Alaska 2023); *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *31 (Md. Cir. Ct. Mar. 25, 2022); *Harper v. Hall*, 868 S.E.2d 499, 553 (N.C. 2022), *overruled in later appeal*, 886 S.E.2d 393 (N.C. 2023). Moreover, the cases grounded in specific constitutional provisions remain instructive here. As discussed next, they highlight the standards and evidence—all doctrinally derived—that are used to prove anti-competitive gerrymandering claims.

III. WBLD's claim is judicially manageable.

In addition to being constitutionally cognizable, WBLD's claim is judicially manageable. WBLD proposes a two-prong test of anti-competitive intent and anti-competitive effect. Anti-competitive intent is present when a plan or district is designed with the purpose of suppressing competition. Anti-competitive effect occurs when a plan or district is consistently less competitive than the vast majority of plans or districts created without considering competition and satisfying all applicable redistricting criteria. Both prongs have been used in anti-competitive gerrymandering litigation in other states without being deemed judicially unmanageable. (Pls. Br. 45–48)

A. *Baseline.* Many of Intervenors' objections to this test flow from their mistaken belief that it seeks ***maximal*** competition—as many districts with razor-thin margins as possible. WBLD agrees that deliberately crafting districts to maximize competition is unwise. Doing so could lead to lopsided partisan outcomes (if the same party wins most coin-flip districts) and huge swings from one election to another. This strategy could also require disregarding traditional criteria in the pursuit of ever closer races.

But WBLD's proposed test doesn't aim for maximal competition. To the contrary, it uses as its baseline the level of competition that naturally emerges when all applicable redistricting criteria are satisfied. Suppose that, when these requirements are met, districts in Madison tend to be heavily Democratic and Northwoods districts are usually safe Republican seats. Then the test wouldn't require tossup districts, achieved by flouting applicable criteria, in either area. Statewide, too, the test in no way demands artificially high competition. Instead, it

merely asks for the degree of competition that organically arises when competition isn't intentionally stifled.

Intervenors mostly say that WBLD's test tries to maximize competition, but they also (inconsistently) allege that it leaves courts at sea by providing no competition benchmark at all. This criticism is inexplicable. The whole point of the test is that it supplies an intuitive and reliable baseline: again, the level of competition that ensues when all applicable criteria are satisfied. So, to apply the test, no court would have to ponder how much competition there ought to be. Rather, a court would first determine how much competition there ***is*** when all germane requirements are met (using methods explained below) and then compare competition under the challenged plan or district to this benchmark.

B. ***Anti-Competitive Intent***. Focusing on the intent prong, Intervenors recycle the familiar issues with all intent inquiries in constitutional law. Whose intent controls? What if policymakers disagree? Couldn't probative evidence be lost to time? These points haven't dissuaded the U.S. Supreme Court from making a racially predominant purpose the linchpin of racial gerrymandering litigation, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), or from recently reorienting racial vote dilution law around "intentional racial discrimination," *Louisiana v. Callais*, 146 S. Ct. 1131, 1155 (2026). More relevant here, courts in other states have had no trouble assessing the presence of anti-competitive intent. *See, e.g.*, *In re Senate Jt. Resolution of Legis. Apportionment 1176*, 83 So. 3d 597, 654 (Fla. 2012); *Harkenrider v. Hochul*, 197 N.E.3d 437, 452–53 (N.Y. 2022). There's no reason why Wisconsin courts would have greater difficulty with this analysis.

Intervenors also ask whether the intent prong is satisfied where (as here) a plan sought to make the fewest possible changes to an earlier map adopted with the purpose of inhibiting competition. This is a question about the prong's application in a particular case, not its inherent manageability. And the answer is yes: A plan that bends backward to maximize continuity with an earlier map perpetuates its predecessor's intent. *See, e.g.*, *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1289 (M.D. Fla. 2022) (finding a racially predominant motive where "race-based districts in the 2011 maps were reenacted by the 2022 legislature with … 'very few' changes").

Intervenors further suggest that a desire to protect incumbents excuses anti-competitive intent. It does not. Helping incumbents win reelection isn't a redistricting criterion in Wisconsin. Courts have also rejected the notion that incumbents deserve a thumb on the line-drawing scale. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 441 (2006) (opinion of Kennedy, J.); *Baumgart v. Wendelberger*, Nos. 01–C–0121, 02–C–0366, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002). So anti-competitive intent isn't justified—if anything, it's more suspect—when it doubles as incumbent protection.

C. *Anti-Competitive Effect*. Turning to anti-competitive effect, most of Intervenors' attacks are belied by their own representations in *Clarke*. For example, the margin of victory—the difference in vote shares between the winning candidate and the runner-up—is the standard measure of competitiveness for both plans in their entirety and individual districts.[1] Intervenors don't dispute this consensus, but they

[1] Intervenors claim that lack of competition doesn't undermine responsiveness or accountability, but their cited studies don't examine these links. Studies that do so find the expected negative relationships. *See, e.g.*, John D. Griffin, *Electoral*

express skepticism of the common ten-percent threshold for distinguishing competitive from uncompetitive districts. However, both the Legislature and the Johnson Intervenors relied on the same threshold in *Clarke*. *See* Leg. Opening Remedial Br. 49, *Clarke*, No. 2023AP001399-OA (Wis. Jan. 12, 2024) (defining "competitive districts" as "between 45-55%"); Johnson Resp. Remedial Br. 21, *Clarke*, No. 2023AP001399-OA (Wis. Jan. 22, 2024) (same). So they can hardly complain about its use here.

Intervenors also note that the margin of victory (and thus competitiveness) can vary by year and based on the candidates running in each district. This is why experts normally don't use legislative election results to evaluate competitiveness (or partisan fairness). Instead, they typically average ***statewide*** election results over ***multiple*** years. Statewide races eliminate district-by-district differences in candidate quality since, in these races, the same candidates compete in all districts. Similarly, by considering multiple races, the analysis is less sensitive to a wave election or one featuring a particularly strong or weak candidate. To illustrate, in *Clarke*, the court-appointed experts "follow[ed] a best practices rule" when scoring maps by "examin[ing] thirteen recent statewide elections across four electoral cycles." Rpt. of Court-Appointed Co-Consultants 11, *Clarke*, No. 2023AP001399-OA (Wis. Feb. 1, 2024). In *Clarke* as well, the Legislature's expert "created an 'index' of votes cast for each party" using the identical thirteen races, thereby "minimiz[ing] the potential impact of any one race." Leg.

Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis, 68 J. Pol. 911 (2006); Philip Edward Jones, *The Effect of Political Competition on Democratic Accountability*, 35 Pol. Behavior 481 (2013).

Opening Remedial Br., App. Vol. II. 183a–184a, *Clarke*, No. 2023AP001399-OA (Wis. Jan. 12, 2024) (*Clarke* Leg. Opening App.).

After choosing the metric and data, the next step is to instruct a redistricting algorithm to randomly generate many district maps that satisfy all applicable criteria. For Wisconsin congressional maps, the legal requirements are equal population, compliance with the Voting Rights Act, and avoidance of racial gerrymandering.[2] For Wisconsin state legislative maps, the legal requirements also include contiguity, compactness, and adherence to county, town, and ward boundaries. Wis. Const. art. IV, § 4. The competitiveness of the challenged plan or district may then be compared to that of the maps or corresponding districts in the computer-generated ensemble. "[W]e can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails?" *Rucho v. Common Cause*, 588 U.S. 684, 738 (2019) (Kagan, J., dissenting). "The further out on the tail, the more extreme the" anti-competitive effect. *Id.*

Intervenors don't impugn the manageability of computational redistricting. For good reason, as the U.S. Supreme Court just cited "the advent of [this] technology" as a rationale for revamping racial vote dilution doctrine. *Callais*, 146 S. Ct. at 1159. The Legislature and the Johnson Intervenors also relied heavily on this technique in *Clarke*. In lengthy reports, their experts described producing state legislative maps that satisfied all applicable criteria and comparing various proposed plans to them. *See Clarke* Leg. Opening App.187a–227a; *Clarke* Leg. Resp. App.44a–64a, 71a–87a; Johnson Opening Remedial Br. 29, *Clarke,*

[2] These legal requirements may be complemented by traditional criteria like those applicable to Wisconsin state legislative districts.

No. 2023AP001399-OA (Wis. Jan. 12, 2024) (specifically comparing the competitiveness of proposed and computer-generated maps). Again, there's no reason why the method Intervenors advocated in *Clarke* wouldn't work here.

Intervenors preview an argument that Wisconsin's congressional plan lacks anti-competitive effect because it supposedly has two competitive districts. This is another point about the application, not the manageability, of WBLD's proposed test. The point is also wrong. According to the measure that all parties apparently accept—the margin of victory—the evidence will show that Wisconsin's plan is less competitive overall than almost all computer-generated maps.

Relatedly, Intervenors speculate that the Assembly plan adopted after *Clarke* might run afoul of WBLD's test. But this plan certainly wasn't designed or passed with anti-competitive intent. To the contrary, its author emphasized that it sought to "create much more competitive districts that respond to prevailing political trends" in Wisconsin. Gov. Opening Remedial Br. 10, *Clarke*, No. 2023AP001399-OA (Wis. Jan. 12, 2024). The ease of reaching this conclusion illustrates the manageability of WBLD's test.

IV. This case is a procedurally proper vehicle.

Hoping to avoid the merits, Intervenors argue that this suit is barred because *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 *(Johnson II*), definitively adopted congressional districts for the entire decade and a circuit court cannot determine that those districts violate the Wisconsin Constitution. Those claims are belied by Wisconsin's statutes, the language of *Johnson II*, and redistricting jurisprudence generally.

First, in filing this suit, WBLD followed the process the Legislature itself designed for redistricting cases and adopted fifteen years ago. *See* Wis. Stat. §§ 751.035, 801.50(4m). This Court agreed, holding last year that, because this action is covered by those statutory provisions, *Wis. Bus. Leaders for Democracy v. WEC*, 2025 WI 52, 418 Wis. 2d 515, 518–20, 27 N.W.3d 522, the Court was required to appoint a panel of three circuit court judges to "consider all the relevant substantive and procedural arguments in due course," *id.* at 522 (Hagedorn, J., concurring in part and dissenting in part). The Legislature could have specified in those provisions that this Court must be the venue for any redistricting challenges. But it didn't; it expressly did otherwise, assigning initial adjudication to the three-judge panel and providing for direct review by this Court. That process makes good sense given the complexity and fact-intensiveness of redistricting cases, which this Court is "ill equipped to handle as a court of last resort." *Johnson v. WEC*, No. 2021AP1450-OA, at 17 (Sept. 22, 2021) (Dallet, J., dissenting).

Second, the circuit court could have granted relief that WBLD seeks. This action isn't a collateral attack on this Court's judgment in *Johnson II*, as Intervenors contend. In *Johnson II*, this Court explicitly stated that the relief it ordered—requiring WEC "to implement the congressional … maps submitted by Governor Evers for all upcoming elections"—"shall remain in effect until new maps are enacted into law ***or a court otherwise directs***." 2022 WI 14, ¶52 (emphasis added). That critical language didn't reserve the role of "directing" new maps solely for this Court. It didn't hold that the congressional districts must remain in effect until ***this*** Court says otherwise. Rather, it recognized that "***a***

court" may may find new districts legally required. The circuit court is just such "a court."

Moreover, even if the circuit court lacked authority to issue an injunction preventing the *Johnson II* injunction from remaining in effect, no such bar exists with respect to declaratory relief.[3] (App.76 ¶B) A declaration by the circuit court that Wisconsin's congressional districts violate Article I, Sections 1 and 22, and Article III would parallel *Clarke*'s determination that the state legislative districts adopted in *Johnson v. WEC*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*), infringed Article IV, Sections 4 and §5. WBLD's request for declaratory relief simply asks the circuit court to do what courts do in ***all*** redistricting cases: decide if current districts, whether adopted legislatively or judicially, offend a state or federal constitutional provision.

Third, while it's true that the Legislature ***itself*** is limited to redistricting once per decade, that constitutional constraint applies only when districts are adopted through the legislative process. *See State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 312, 63 N.W.2d 52 (1954). There's no such constitutional limit on courts. Indeed, mid-decade redistricting cases going back decades—including in Wisconsin—make clear that courts may review and alter districts adopted by courts earlier in the same decade. *See, e.g.*, *Clarke*, 2023 WI 79, ¶54.

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[3] In *Bothfeld v. Wisconsin Elections Commission*, WBLD pointed out that only this Court can "enjoin" or "otherwise alter" its *Johnson II* injunction. Notice of Mot. and Unopposed Mot. to Intervene by WBLD, Ex. ¶16, No. 2025AP996-OA (Wis. June 5, 2025). WBLD never suggested that only this Court could grant ***declaratory relief.*** Moreover, declaratory relief from the circuit court would be far from academic; it would be a predicate for this Court, on review, to modify its previous injunction. *See Clarke*, 2023 WI 79, ¶54 (confirming that "injunctive relief" is "available" from this Court in response to similar procedural objections).

V. Laches does not bar this suit.

Intervenors' next procedural objection is laches. But laches is no more ground for dismissal here than in any of the myriad redistricting cases that have rejected that argument. *See, e.g.*, *Clarke*, 2023 WI 79, ¶¶41–43. These authorities are clear: laches doesn't apply where the plaintiff asserts an ongoing constitutional violation, where factual development is required to assess prejudice, or where the plaintiff couldn't have brought the claim earlier because it wasn't ripe. All three factors are present here.

First, many redistricting suits (including this one) are about allegedly unlawful districts that will continue inflicting harm as long as they're used. In this common situation, courts deem laches inapposite: "Because of the ongoing nature of the violation, plaintiffs' … claim ought not be barred by laches." *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990); *see also, e.g.*, *Smith v. Clinton*, 687 F. Supp. 1310, 1313 (E.D. Ark. 1988) (rejecting laches defense where "the injury alleged by the plaintiffs is continuing, suffered anew each time a[n] … election is held"); *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, 234 N.E.3d 1002, 1019 (N.Y. 2023) (rejecting opposing counsel's laches defense where plaintiffs asked for relief "in the future" and there was "time" to adopt a remedy "ahead of the upcoming elections"). In *Clarke*, this Court relied on exactly this logic to find laches inapplicable. The plaintiffs there didn't seek relief with respect to a ***past*** "legally conducted election." 2023 WI 79, ¶43 n.20. Instead, they asked that "constitutional maps [be]

adopted in time for the ***next*** election." *Id.* (emphasis added). So, too, here.[4]

Second, Intervenors haven't established any prejudice due to WBLD's supposed delay. To be sure, they ***claim*** various injuries: litigation costs, loss of evidence, voter confusion, and so on. But laches is an affirmative, equitable defense, each element of which "[t]he party seeking application … bears the burden of proving." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶12, 393 Wis. 2d 308, 946 N.W.2d 101. Because this case is still at the motion-to-dismiss stage, there has been no fact development, and Intervenors haven't even tried to prove the elements of laches. These elements are inherently fact-bound considerations that require Intervenors to properly develop supportive evidence. At this point, Intervenors offer nothing more than lawyers' arguments.

Third, WBLD didn't unreasonably delay in bringing suit. Delay is calculated from when a plaintiff "knew or should have known" of their "potential claim." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶21, 389 Wis. 2d 516, 936 N.W.2d 587. A claim of anti-competitive gerrymandering requires evidence of consistent suppression of competition. (App.62–63 ¶47) Without such evidence, WBLD's claim would have been weaker and more speculative. Now that the 2022 and 2024 elections have occurred, however, their results confirm the congressional plan's lack of competition under a range of electoral environments. *See, e.g.*, *League of Women Voters of Mich. v. Benson*, 373

[4] In *Trump v. Biden*, by contrast, "the Campaign waited until after the votes were cast" to object to certain ballots "[r]ather than raise its challenges in the weeks, months, or even years prior." 2020 WI 91, ¶22, 394 Wis. 2d 629, 951 N.W.2d 568. Here, WBLD seeks a prompt decision from this Court and trial in April 2027, but the circuit court retains authority to manage its calendar in the interests of justice.

F. Supp. 3d 867, 909–10 (E.D. Mich.) ("Given that relying on a single election cycle is 'unsatisfactory' … laches cannot bar Plaintiffs' claims on the basis that they waited three election cycles to sue."), *vac'd on other grounds*, 589 U.S. 1031 (2019).[5]

VI. Relief here would not violate the federal Elections Clause.

Finally, Intervenors' argument that ruling in WBLD's favor would violate the federal Elections Clause fails on its own terms. WBLD asks this Court to follow, not to flout, the "ordinary bounds of judicial review." *Moore*, 600 U.S. at 36. Moreover, the independent state legislature (ISL) theory is inapplicable to a plan the Legislature never passed.

As detailed above, the standard interpretive tools of text, history, and precedent all support recognizing WBLD's claim of anti-competitive gerrymandering. *See* Part II, *supra*. A ruling carefully and thoroughly applying these tools therefore could not "exceed" or "transgress" the "ordinary bounds of judicial review." *Moore*, 600 U.S. at 36–37. The tools are how courts in Wisconsin and elsewhere have resolved constitutional disputes for centuries. Rigorous use of the tools is as conventional as constitutional adjudication gets.

Because most courts act judicially rather than legislatively, Intervenors fail to cite a single post-*Moore* decision holding that the Elections Clause bars a state court from enforcing state constitutional provisions that pertain to federal elections. In fact, no such decisions exist; no court has applied *Moore* as Intervenors urge. As Judge Neubauer recently observed, "'[n]othing in [the Elections] Clause

[5] Additionally, Plaintiff Lyerly isn't yet eighteen and the November 2026 elections will be the first in which he may vote. (App.59 ¶33) So, for him, these are "the soonest elections for which relief could be granted." *Clarke*, 2023 WI 79, ¶42.

instructs, nor has this Court ever held, that a state legislature may [regulate] … federal elections in defiance of provisions of the State's constitution.'" *Democratic Nat'l Comm. v. Boehm*, No. 2024AP2484, 2026 WL 2184330, ¶80, at *20 (Wis. Ct. App. July 29, 2026) (Neubauer, P.J., concurring) (quoting *Moore*, 600 U.S. at 26) (recommended for publication).

An ISL violation is especially implausible here thanks to the challenged congressional plan's history. That plan wasn't legislatively adopted and signed into law; to the contrary, the elected branches ***failed*** to enact new congressional districts, obligating this Court to step in. *See Johnson II*, 2022 WI 14, ¶2. This Court then ***rejected*** the congressional map proposed by Intervenors here and instead selected the Governor's proposed map—over Intervenors' (then) ***opposition***. *See id.* ¶¶13–25.[6] Compare all that to *Moore*, where the North Carolina legislature itself passed the plan the state supreme court later held to be an unconstitutional partisan gerrymander. Even given that very different posture, the ISL argument ***still*** failed. *See Moore*, 600 U.S. at 36–37. The same result must follow here, where the Legislature neither authored nor even supported the plan it now champions.

In any event, at this stage, WBLD asks only that this Court reverse the circuit court, recognize WBLD's claim, and remand for further proceedings. The Elections Clause question is thus not presented. If it ever is, it can be answered then.

[6] Intervenors even sought emergency relief from the U.S. Supreme Court against this plan. *See Grothman v. WEC*, 142 S. Ct. 1410 (2022) (denying emergency stay).

Conclusion

For the foregoing reasons, the circuit court's order dismissing this case should be reversed.

Dated: August 21, 2026.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,960 words.

Electronically signed by Douglas M. Poland
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CERTIFICATION

I hereby certify that filed with this motion, as a separate document, is an appendix that complies with Wis. Stat. § (Rule) 809.62(2)(f) and § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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