Appeal No. 26AP1008

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 Ordern, 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

PETITION FOR REVIEW

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Introduction

Wisconsin Business Leaders for Democracy ("WBLD"), the Plaintiffs-Appellants in this case, file this Petition for Review to preserve their ability to appeal a final judgment dismissing their claims challenging the current Wisconsin congressional districts as an anti-competitive gerrymander in violation of the Wisconsin Constitution. The judgment is an adverse decision handed down by a panel of three circuit court judges appointed under Wis. Stat. § 751.035(1). As a threshold issue, WBLD ask this Court to address a novel question of appellate procedure made necessary due to a hole in the applicable procedural statutes: How does a party appeal from an adverse decision by such a panel, given that Wis. Stat. § 751.035(3) provides that appeals "may be heard by the supreme court and may not be heard by a court of appeals," where all other statutory procedures governing appeals from an adverse circuit court ruling require appeal to the court of appeals?

WBLD present this Petition in the alternative to their prior Notice of Appeal. (App. 18, docketed as *Wis. Bus. Leaders for Democracy v. WEC*, No. 2026AP1008 (Wis., initiated Apr. 29, 2026)) They believe that the text, structure, and purpose of Wis. Stat. § 751.035(3) support their appeal as of right. However, another party has asserted in correspondence to this Court that the sole statutory procedure to appeal from a final judgment rendered by a circuit court as a matter of right is through Wis. Stat. § 808.03(1), which expressly provides only for appeals to the court of appeals. (App. 21, May 1, 2026, Letter from Counsel for *Johnson* Respondents) That party and another party have asserted that the sole procedure for appeal of the three-judge panel's decision is through the procedure invoked by this filing, a Petition for Review filed pursuant to Wis. Stat. § 809.62. (*Id.*; App. 23, May 1, 2026, Letter from Counsel for the Wisconsin State Legislature) That procedure too,

however, is expressly limited, applying solely to "review of an adverse decision of the court of appeals." Wis. Stat. § 809.62(1m)(a)1.

All parties that have weighed in agree that this Court should address this threshold issue of how to appeal from a three-judge panel's decision. (App. 21, May 1, 2026 *Johnson* Respondents' Letter; App. 23, May 1, 2026 Legislature's Letter; App. 24, Resp. of Cong. Glenn Grothman, et al., filed May 7, 2026) Whether in the direct appeal docketed separately, or through a discretionary appeal commenced by granting this Petition, the Court should decide this novel procedural issue, as well as review and correct the fundamental errors of law underpinning the circuit court's dismissal order. Those purely legal errors meriting this Court's discretionary review are the same as those identified in the appeal already docketed:

- Whether the circuit court erred in holding that WBLD's anti-competitive gerrymandering claims "are functionally equivalent to partisan gerrymandering claims" for purposes of analyzing whether the claims are barred by the political question doctrine and dismissing the claims on that basis under *Johnson v. WEC*, 2021 WI 87, ¶8, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"). (App. 14–15)

- Whether the circuit court erred in concluding that this Court has "effectively foreclosed [all constitutional challenges to the congressional map] by holding in *Johnson I* that Article IV contains 'the exclusive repository of state constitutional limits on redistricting.'" (App. 17 (quoting *Johnson I*, 2021 WI 87, ¶63))

- Whether, in light of its own conclusion that anti-competitive gerrymandering claims are "functionally equivalent" to partisan gerrymandering claims and the bar to adjudicating partisan gerrymandering claims in federal courts erected by *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019), the circuit court erred in foreclosing Wisconsin voters from any remedy for the drawing of districts to intentionally stifle competitive elections, despite the Wisconsin Constitution's guarantee in Article I, Section 9 that a remedy is available for all wrongs.

These are pure questions of law, of statewide import, and—given the frequency of redistricting litigation in Wisconsin courts and the inevitability of redistricting litigation following a future decennial census—all-but-certain to recur. WBLD urge this Court to exercise its jurisdiction—either through the pending appeal or this Petition—to take up and decide these critical issues on a timeline that preserves the possibility that, should WBLD prevail below, a remedy can be implemented before the 2028 congressional elections.

The circuit court panel and all parties agreed upon a scheduled trial in April 2027, with the goal of preserving that timeline. Delaying resolution of the issues presented in this appeal would provide insufficient time for fact development, expert discovery, trial, and adjudication on a schedule that will permit implementation of new, constitutionally permissible congressional districts for the 2028 election. The only way to ensure such a remedy can be achieved—if WBLD prove that the facts and the law warrant relief—is for this Court to promptly review the dismissal order.

Issues Presented

1. What is the proper procedure to appeal from an adverse decision of a panel of three circuit court judges appointed pursuant to Wis. Stat. § 751.035(3) and what standards or criteria govern this Court's consideration of such an appeal?

2. The circuit court held that WBLD's anti-competitive gerrymandering claims "are functionally equivalent to partisan gerrymandering claims" for purposes of analyzing whether the claims are barred by the political question doctrine and dismissed the claims on that basis, stating that it was applying this Court's holdings in *Johnson I*. (App. 14–15)

    a. Did the circuit court err by finding that anti-competitive gerrymandering claims "are functionally equivalent to partisan gerrymandering claims" because "[j]ust like with partisan fairness, the competitiveness of a district is difficult to ascertain due to the fluctuating nature of political identity and the lack of

party registration" (App. 14), without allowing any discovery, fact development, or presentation of evidence on that issue?

b. No party to the *Johnson* action asserted a claim for anti-competitive gerrymandering, nor did the Court consider or adjudicate such a claim. Is *Johnson I* an advisory opinion to the extent that the circuit court read it to require dismissal of WBLD's anti-competitive gerrymandering claims?

3. The circuit court concluded that this Court has "effectively foreclosed [all constitutional challenges to the congressional map] by holding that Article IV contains 'the exclusive repository of state constitutional limits on redistricting.'" (App. 17 (quoting *Johnson I*, 2021 WI 87, ¶63)) Did the panel err by extrapolating that, because it "is bound by th[is] Court's interpretations, it must alternatively dismiss WBLD's claims for failure to state a cognizable constitutional cause of action"? (*Id.*)

4. The circuit court's conclusion, if allowed to stand, would deprive Wisconsin voters of any legal remedy for the deprivation of their right to vote caused by the gerrymandered congressional districts. The U.S. Supreme Court has foreclosed federal courts from adjudicating partisan gerrymandering claims. *Rucho*, 588 U.S. at 718. If the circuit court ruling that WBLD's anti-competitive gerrymandering claims are "functionally equivalent" to partisan gerrymandering claims is not reversed, then Wisconsin courts, too, will be complicit in depriving Wisconsin voters of any remedy for the intentional drawing of districts to stifle competitive elections. Does such a holding violate the Wisconsin Constitution's Article I, Section 9 guarantee that a remedy is available for all wrongs?

Reasons the Court Should Grant this Petition for Review

The panel's decision below merits this Court's review. As an initial matter—as an ***alternative*** to proceeding with the appeal already docketed as No. 2026AP1008—the Court should exercise discretionary review pursuant to Wis. Stat. § 751.035(3), as that statute expressly provides for discretionary appeal from the panel's final order.

Such discretionary appeal should be available from any final order of a three-judge panel appointed pursuant to § 751.035. But WBLD also meet Wis. Stat. § 809.62's criteria establishing "special and important" reasons for the Court to invoke its discretionary jurisdiction:

- **Wis. Stat. § (Rule) 809.62(1r)(a)**: Issues Three and Four present real and significant issues of Wisconsin constitutional law.
- **Wis. Stat. § (Rule) 809.62(1r)(b)**: Issue One demonstrates a need for established procedure to appeal an adverse final judgment issued by a panel appointed pursuant to Wis. Stat. § 751.035(3).
- **Wis. Stat. § (Rule) 809.62(1r)(c)**: All four issues present novel questions of Wisconsin substantive and procedural law with significant statewide impact that are nearly certain to recur in the context of continuing mid-decade redistricting actions and litigation over state legislative and congressional districts during future decennial redistricting cycles.
- **Wis. Stat. § (Rule) 809.62(1r)(d)–(e)**: Issue Two shows that either the circuit court's ruling misapplies—and therefore conflicts with—this Court's *Johnson I* decision, or otherwise that the *Johnson I* decision is ripe for reexamination.

Statement of the Case

In 2022, this Court adopted congressional districts under a "least change" approach, perpetuating the intentional design of congressional districts to stifle competitive elections in 2011. Although challenges were brought to the 2022 districts as partisan gerrymanders and on other grounds,

this Court has repeatedly declined to adjudicate the merits of those challenges.[1]

Last summer, WBLD brought a new challenge, based on a legal theory never before explicitly asserted in Wisconsin, alleging that Wisconsin's congressional districts constitute an anti-competitive gerrymander in violation of several provisions of the Wisconsin Constitution. (App. 32) WBLD's Complaint[2] alleged three separate claims for relief:

- Count I, alleging a violation of the equal protection guarantee and additional inherent rights guaranteed in Article I, Section 1 of the Wisconsin Constitution. (App. 91–93, ¶¶84–95)
- Count II, alleging a violation of the free government promise in Article I, Section 22 of the Wisconsin Constitution. (App. 93–94, ¶¶96–103)
- Count III, alleging a violation of WBLD's members' and the individual Plaintiffs' right to vote, guaranteed in the Wisconsin Constitution. (App. 94–95, ¶¶104–10)

The theory underlying these claims was substantively novel. It was also the first case in which this Court implemented a Wisconsin procedure, enacted in 2011, requiring it to appoint a panel of three circuit court judges to adjudicate a challenge to electoral districts.

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[1] *See Bothfeld v. WEC*, Order, No. 2025AP996-OA (Wis., June 25, 2025) (denying petition for original action); *Felton v. WEC*, Order, No. 2025AP999-OA (Wis., June 25, 2025) (denying petition for original action); *Johnson v. WEC*, Order, No. 2021AP1450-OA (Wis., Mar. 1, 2024) (denying motion to reopen remedial congressional districts in light of *Clarke v. WEC,* 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370).

[2] WBLD filed their Complaint for Declaratory and Injunctive Relief and Summons on July 8, 2025 (App. 32), and filed an Amended Complaint on January 7, 2026, which they corrected the next day, without substantively changing the operative claims at issue. That Corrected First Amended Complaint, filed on January 8, 2026 (App. 66), was the operative complaint in effect at the time of the circuit court's dismissal order.

On July 10, 2025, pursuant to Wis. Stat. § 801.50(4m), the Dane County Clerk of Courts notified this Court's Clerk of the filing. (App. 98) On September 25, 2025, this Court ordered briefing on the issue of "whether WBLD's complaint filed in the circuit court constitutes 'an action to challenge the apportionment of a congressional or state legislative district' under WIS. STAT. § 801.50(4m)." (App. 100) After receiving briefing on that issue from the parties, on November 25, 2025, this Court issued an order answering the question in the affirmative, appointing a three-judge panel, and designating venue in the Circuit Court for Dane County. *Wis. Bus. Leaders for Democracy v. WEC*, 2025 WI 52, 418 Wis. 2d 520, 27 N.W.3d 522.

The circuit court granted three separate motions to intervene, which the named parties did not oppose. (App. 108–11) Defendants answered WBLD's Complaint (App. 112), and all three groups of Intervenors-Defendants-Respondents moved to dismiss the Complaint (App. 114–202). The circuit court set a briefing schedule on the motions to dismiss and a trial date in April 2027 that, should WBLD prevail, would allow relief in time to implement new maps for the 2028 congressional elections. (App. 203–05; App. 229)

On April 28, 2026, the circuit court panel issued its Memorandum and Order dismissing, with prejudice, WBLD's Complaint for failure to state a claim upon which relief can be granted. (App. 5) The circuit court panel grounded its dismissal in its interpretation and application of this Court's ruling in *Johnson I*. Specifically, the panel reached two over-arching conclusions:

- ***First***, that WBLD's anti-competitive gerrymandering claims "are functionally equivalent to partisan gerrymandering claims" for purposes of analyzing whether the claims are barred by the political question doctrine because "[j]ust like with partisan fairness, the

competitiveness of a district is difficult to ascertain due to the fluctuating nature of political identity and the lack of party registration." (App. 14) The Court dismissed the claims on that basis, stating that it was applying this Court's holdings in *Johnson I*, 2021 WI 87, ¶8. (*Id*. 14–15)

- ***Second***, that in *Johnson I* this Court "effectively foreclosed [all constitutional challenges to the congressional map] by holding that Article IV contains 'the exclusive repository of state constitutional limits on redistricting.'" (App. 17 (quoting *Johnson I*, 2021 WI 87, ¶63))

That same day, WBLD filed a Notice of Appeal to this Court. (App. 18) That appeal has been docketed, the record has been transferred to this Court, and the online docket identifies a deadline of June 29, 2026, for WBLD's opening brief. *See WBLD v. WEC*, No. 2026AP1008. WBLD moved this Court to expedite briefing and oral argument in the docketed appeal to ensure the possibility of relief in time for Wisconsin's 2028 congressional elections. (App. 244) Three groups of Intervenors-Defendants-Respondents opposed the motion (App. 24; App. 254; App. 263), which remains outstanding.

As explained above and in Part I, *infra*, in light of the lack of statutory or other authority providing either a clear and authoritative procedure or pertinent criteria for appeal of the circuit court's decision below, and in an abundance of caution to avoid being precluded from appealing the decision below, WBLD now files this Petition for Review as an alternative to its pending direct appeal.

Argument

I. The Court should grant the Petition to establish the proper procedure for an appeal from a final judgment by a circuit-court panel appointed under Wis. Stat. § 751.035(3).

The Court should grant the Petition to decide, in part, a threshold legal issue of first impression left open by the statute under which the case proceeded before the circuit court. As the Court recognized in its ruling in November 2025, upon receiving notice from the Dane County Clerk of Courts in accordance with Wis. Stat. § 801.50(4m) that the action below had been commenced, this Court was obligated by Wis. Stat. § 751.035(1) to appoint a panel of three circuit court judges to hear the case and designate a venue for the case. *WBLD*, 2025 WI 52, pp. 3–4. The Court did so, appointing a panel including one judge each from the Dane, Marathon, and Portage County Circuit Courts. *Id.* The Court further ordered the action to proceed in the Circuit Court for Dane County. *Id.* at 5. Consequently, the action below proceeded pursuant to § 751.035.

When the three-judge panel issued its ruling dismissing WBLD's claims on April 28, 2026, and entered final judgment on the same date, it raised a threshold issue for WBLD: how to appeal the circuit court's ruling. Under Wisconsin's rules of appellate procedure, appeals from circuit court rulings that are "final"—whether a "judgment" or "order"—"may be appealed as a matter of right." Wis. Stat. § 808.03(1). The circuit court ruling below is indisputably a "final order" under Section 808.03(1); it "disposes of the entire matter in litigation as to one or more of the parties" and was "[e]ntered in accordance with s. 806.06(1)(b)" when filed in the office of the Dane County Clerk of Courts. Consequently, WBLD appealed the three-judge circuit court panel's final order as of right. (App. 18)

Direct appeal to this Court is appropriate because the Wisconsin Statutes "expressly provide[] by law," Wis. Stat. § 808.03(1), that appeals from a panel's decision may be brought to this Court. Wis. Stat. § 751.035(3). Intervenors argue otherwise, but they are wrong: Section (Rule) 809.62 is expressly limited to "review of an adverse decision ***of the court of appeals***" (emphasis added). Regardless, to the extent there is any ambiguity, this Court can and should clarify the proper appellate procedure in an exercise of its constitutional superintending authority. Wis. Const. art. VII, § 3(1)–(2).

Given the sheer number of redistricting actions filed by the mid-point in this decade[3] and the near inevitability of litigation around state legislative and congressional districts after future censuses, the Court should take up the issue and rule promptly, whether in the context of the pending direct appeal or in a proceeding commenced by granting this Petition.

II. The Court should grant the Petition to correct the legal errors committed by the circuit court in holding that the anti-competitive gerrymandering claims asserted in the complaint are "functionally equivalent" to partisan gerrymandering claims, thus barred by this Court's opinion in *Johnson I*.

The circuit court erroneously concluded that WBLD's "anti-competitive gerrymandering claims are functionally equivalent to partisan gerrymandering claims." (App. 14) That conclusion rests on the court's unsupported assertion that "[j]ust like with partisan fairness, the competitiveness of a district is difficult to ascertain due to the fluctuating nature of political identity and the lack of party registration" (*id.*), an

[3] By WBLD's count there have been seven (not including this Petition): *Johnson v. WEC*, Appeal No. 2021AP1450-OA; *Clarke v. WEC*, Appeal No. 2023AP1399-OA; *Wright v. WEC*, Appeal No. 2023AP1412-OA; *Bothfeld v. WEC*, Appeal No. 2025AP996-OA; *Felton v. WEC*, Appeal No. 2025AP999-OA; *WBLD v. WEC*, Dane Cnty. Cir. Ct. Case No. 2025CV2252; *Bothfeld v. WEC*, Dane Cnty. Cir. Ct. Case No. 2025CV2432.

assertion the panel had no basis to make because it dismissed WBLD's claims before any discovery, fact development, or presentation of evidence.

That holding not only is legal error meriting reversal in its own right but one that also led the circuit court to commit a separate, additional error of law in holding that *Johnson I* bars WBLD's anti-competitive gerrymandering claims (App. 17), even though the *Johnson* Court had no anti-competitive gerrymandering claim before it. Read in this way, *Johnson I* is an advisory opinion without the force of law, and the circuit court erred in treating it as binding.

Each of these errors of law merits this Court's review on its own, but WBLD address them together because they arise from the same analysis in the circuit court's Memorandum.

A. The circuit court erroneously conflated two distinct claims: partisan and anti-competitive gerrymandering.

The circuit court's holding that WBLD's anti-competitive gerrymandering claim is non-justiciable wrongly conflates it with a partisan gerrymandering claim. The circuit court first asserted that this Court in *Johnson I* held partisan gerrymandering non-justiciable under the Wisconsin Constitution. (App. 13–14) (As discussed below, this assertion is also wrong.) The circuit court then reasoned that "anti-competitive gerrymandering claims are functionally equivalent to partisan gerrymandering claims." (App. 14) Based on this flawed syllogism, the court concluded that anti-competitive gerrymandering must be non-justiciable as well. (App. 15)

In reality, the similarities between anti-competitive and partisan gerrymandering start and end with the fact that both involve redistricting and likely election results. Far from being "functionally equivalent" (App. 14), the claims differ in their underlying injuries, harmed parties, standards for

liability, and proper remedies. Thanks to these distinctions, anti-competitive gerrymandering is conceptually, legally, and practically unlike partisan gerrymandering. Whatever *Johnson I* may have said about partisan gerrymandering claims thus cannot render anti-competitive gerrymandering claims non-justiciable.

Start with the gravamen of each theory. Partisan gerrymandering is commonly defined as "draw[ing] district lines to 'pack' and 'crack' voters likely to support the disfavored party," thus unfairly boosting the number of seats won by the line-drawing party. *Rucho*, 588 U.S. at 730 (Kagan, J., dissenting). In contrast, the essence of anti-competitive gerrymandering is that competition is lower than it would be under a neutral map. Candidates prevail by larger margins; fewer districts are competitive; less legislative turnover occurs; and core democratic values like accountability and responsiveness are undermined. Put another way, ***which party*** wins districts is the paramount issue in partisan gerrymandering litigation. But the crux of an anti-competitive gerrymandering case is districts' ***competitiveness***, regardless of their winners.

The difference between these theories is apparent in the facts they each highlight about Wisconsin's congressional plan. From a partisan gerrymandering perspective, the key point is the plan's pro-Republican bias. Republicans consistently win six of Wisconsin's eight congressional districts even though the state's electorate is nearly perfectly divided. From the standpoint of anti-competitive gerrymandering, conversely, the most compelling evidence is the startling lack of competition in Wisconsin's congressional elections as measured by the margin of victory. In the 2022 and 2024 elections, for example, the victor in each district won by a median margin of almost thirty percentage points. Only one district (District 3) was

genuinely competitive. Outside this district, every single race was decided by double digits. Moreover, when districts are drawn without considering election results, they are almost always more competitive. That is, Wisconsin's congressional plan is a stark outlier compared to alternative maps in its inhibition of competition. (App. 88, ¶¶70–73)

Partisan and anti-competitive gerrymandering also diverge in their respective legal standards. Unsurprisingly, the usual test for partisan gerrymandering zeroes in on a plan's partisan skew: Is it intentional? Is it large and durable? Can it be justified by any legitimate factor? *See, e.g., Rucho*, 588 U.S. at 735 (Kagan, J., dissenting). WBLD's proposed test for anti-competitive gerrymandering, on the other hand, makes no reference to a plan's partisan tilt. Rather, it asks (1) whether line-drawers purposefully suppressed competition; and (2) whether the challenged plan is materially less competitive than alternative maps created without considering election results. (App. 90, ¶79) In answering these questions, the evidence central to partisan gerrymandering litigation—involving a plan's partisan bias relative to other maps—is wholly irrelevant.

Partisan and anti-competitive gerrymandering further differ in whom they injure. Voters who support, and candidates who affiliate with, the party targeted by partisan gerrymandering are the victims of partisan gerrymandering. Their chief harm is their diminished "collective representation in the legislature." *Gill v. Whitford*, 585 U.S. 48, 68 (2018) (internal quotation marks omitted). Anti-competitive gerrymandering, however, injures ***all*** voters—regardless of party affiliation—placed in districts less competitive than they would be under a neutral map. Voters' choices at the polls matter less, or even not at all, in uncompetitive districts. Legislators elected from these districts also have less incentive to represent

their constituents effectively. After all, no matter how these representatives behave in office, they are nearly certain to retain their seats.

Partisan and anti-competitive gerrymandering claims are distinct, too, in the remedies they seek. The appropriate relief after a partisan gerrymander has been identified is a map that is not skewed in either party's favor. *Cf. Clarke*, 2023 WI 79, ¶70 (courts "do not have free license to enact maps that privilege one political party over another"). After anti-competitive gerrymandering has been proven, though, the proper remedy is a map that does not artificially inhibit competition. Most (let alone all) districts need not be competitive, but the remedial map should be similar in its overall competitiveness to reasonable alternative maps.

In its cursory discussion, the circuit court failed to mention—let alone grapple with—any of these contrasts. Instead, the court simply stated that, "[i]n a two-party system, partisan fairness and competitiveness are correlated: a more competitive map is typically a fairer map, whereas less competition usually means less partisan fairness." (App. 14) That assertion not only failed to accept the Complaint's allegations as true at the motion to dismiss stage of the proceedings, as the circuit court was obligated to do, but it also is incorrect; in fact, partisan fairness and competition are entirely uncorrelated. According to a historical study of state house plans over a fifty-year period, "there is plainly no meaningful relationship between electoral competitiveness and the magnitude of [plans' partisan bias]." Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1524 (2018). That is, "[h]ow close races tend to be tells us nothing about the size of a plan's partisan skew." *Id*. Likewise, an analysis of ensembles of computer-generated congressional maps finds little connection between electoral competition and

partisan fairness in most cases. And where a link does appear, it is as likely to be negative (in that more competition is associated with ***less*** partisan fairness) as positive. *See* Nicholas O. Stephanopoulos, *Redistricting Without Tradeoffs*, 126 Colum. L. Rev. ___ (forthcoming 2026) (manuscript at 47), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5900143.

The circuit court also opined that "[t]he objective of both theories" is the same, namely "to change 'the partisan makeup of districts.'" (App. 14) But as explained above, partisan and anti-competitive gerrymandering claims actually have very different goals. The aim of a partisan gerrymandering claim is to make a plan more neutral in its treatment of the major parties so that neither party wins an unfairly large share of seats. Conversely, an anti-competitive gerrymandering claim aspires to make districts more competitive, regardless of which party ultimately wins them.

Additionally, when a plurality of this Court referred to "the partisan makeup of districts" in *Johnson I*, it did so with respect to partisan fairness—not competition. The plurality criticized "claims that courts should judge maps for ***partisan fairness***." 2021 WI 87, ¶39 (lead op.) (emphasis added). The plurality also noted the supposed absence of "judicially manageable standards by which we could determine the ***fairness*** of the partisan makeup of districts," as well as the alleged lack of any right "to a particular ***partisan configuration***." *Id*. (emphases added). The plurality concluded: "Because ***partisan fairness*** presents a purely political question, we will not consider it." *Id*. (emphasis added). These excerpts unambiguously show that the *Johnson I* plurality had in mind only partisan fairness when it mentioned districts' partisan makeup. It was not alluding to districts' competitiveness, a factor neither raised by the parties nor addressed by the Court.

The circuit court further erred when it concluded that the logic of the *Johnson I* plurality "appl[ies] with equal force to anti-competitive gerrymandering." (App. 14) In the court's opinion, "the competitiveness of a district is difficult to ascertain due to the fluctuating nature of political identity and the lack of party registration." (*Id.*) But the court cited no evidence in support of this empirical claim about the difficulty of determining district competitiveness. Had the court allowed the case to proceed to discovery, WBLD would have demonstrated that there exist reliable methods for evaluating district competitiveness—and that these techniques all lead to the same conclusion about the stark lack of competition in Wisconsin's current congressional districts. WBLD also pointed out in its briefs below that numerous courts have assessed district competitiveness without finding this inquiry unworkable. The circuit court failed to engage with any of these precedents—one of which involved a successful anti-competitive gerrymandering claim brought by the Congressmen's own counsel. *See Harkenrider v. Hochul*, 197 N.E.3d 437, 452–53 (N.Y. 2022); *see also, e.g., Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 682 (Ariz. 2009); *In re Colo. Indep. Legis. Redistricting Comm'n*, 513 P.3d 352, 365 (Colo. 2021); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015); *In re Senate Joint Resolution of Legis. Apportionment 1176*, 83 So. 3d 597, 654 (Fla. 2012).

In a similar vein, the court wrote that "the competitiveness of a map poses the same type of 'subjective question' ... as the fairness of a map." (App. 14 (quoting *Johnson I*, 2021 WI 87, ¶44)) Again, this claim about the unmanageability of analyzing competitiveness was unaccompanied by any evidence. And again, had WBLD been permitted to proceed with their suit, they would have shown that competitiveness is substantially ***easier*** to

ascertain objectively than partisan fairness. This is because there are many measures of partisan fairness, some based on arithmetical relationships between seat and vote shares, others grounded in comparisons between enacted plans and alternative lawful maps. Competitiveness, on the other hand, can only be determined relative to alternative lawful maps; there is no arithmetical ideal of competitiveness for plans or districts. Whether for plans or districts, competitiveness is also generally evaluated using a single metric: the margin of victory of the prevailing candidate. There is no disagreement that "[t]he 'traditional' measure of competitiveness" is "the simple difference in vote shares between the winner and the runner-up." Gary W. Cox et al., *Measuring the Competitiveness of Elections*, 28 Pol. Analysis 168, 169 (2020).

Lastly, the circuit court mused that "the Wisconsin Constitution's delegation of redistricting authority to the legislature must also permit anti-competitive intent if it permits partisan intent." (App 14) This is more *ipse dixit*. Anti-competitive intent—the desire to suppress competition—plainly differs from partisan intent, which seeks to benefit one party to the detriment of its rival. Even if the *Johnson I* plurality was right that partisan intent is permissible under the Wisconsin Constitution, it in no way follows that another kind of intent must be equally valid. The legal question is simply distinct. Indeed, in their briefing below, WBLD produced copious evidence, spanning constitutional text, history, and doctrine, establishing that the Wisconsin Constitution does not countenance—and indeed forbids—anti-competitive intent. *See, e.g., State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 566, 126 N.W.2d 551 (1964) (noting that the Wisconsin Supreme Court previously "condemned gerrymandering" taking the form of "a desire to preserve the political status quo"); *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 23, 128 N.W. 1041 (1910) (holding that a statute would be unconstitutional if

"the purpose of the law" was "perpetuating [a party's] supremacy"). Once more, the circuit court did not even cite, let alone distinguish, any of these authorities.

Accordingly, the court gravely erred by equating partisan and anti-competitive gerrymandering. These practices fundamentally diverge, as do the legal theories that target these separate redistricting abuses. Because of this divergence, the views of the *Johnson I* plurality—even if those views had majority support necessary to create binding precedent in Wisconsin—cannot control this case. Regardless of whether the Wisconsin Constitution prohibits partisan gerrymandering, the justiciability of anti-competitive gerrymandering must be—but was not—independently considered.

B. As applied to preclude WBLD's anti-competitive gerrymandering claim—a novel claim never before presented to or adjudicated by this or any other Wisconsin court—*Johnson I* constitutes an advisory opinion, not binding legal authority.

It is axiomatic that this Court, "absent[] some exigency [declines to] predetermine questions that may arise in the future under a state of facts which may be different from those which exist or may with certainty be anticipated ... . " *In re Grotenrath's Estate*, 215 Wis. 381, 254 N.W. 631, 633 (1934). Rather, as the Court has declared of its own judicial duty, "it is our job to adjudicate the dispute in front of us." *State v. Grandberry*, 2018 WI 29, ¶31 n.20, 380 Wis. 2d 541, 910 N.W.2d 214 (citing *State v. Steffes*, 2013 WI 53, ¶27, 347 Wis. 2d 683, 832 N.W.2d 101). Consequently, Wisconsin courts do not render holdings that bind future court decisions based upon claims never brought by litigants to a proceeding. Such rulings are mere advisory opinions, without the force of law. *Am. Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 203–04, 188 N.W.2d 529 (1971) (courts refrain

from rendering a judgment that "would not terminate the uncertainty or controversy giving rise to the proceedings"); *City of Milwaukee v. Milwaukee Cnty.*, 256 Wis. 580, 583, 42 N.W.2d 276 (1950) ("The court may not give advisory opinions nor pass upon uncertain or contingent situations."); *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 629 (1936).

Despite the bar on advisory opinions, the circuit court read and applied this Court's opinion in *Johnson I* in a way that violates that rule. Below, WBLD alleged novel claims for anti-competitive gerrymandering, based on alleged facts and legal theories distinct from any advanced by parties in *Johnson I*. Moreover, as is evident both from the text of *Johnson I* and its underlying pleadings, no party alleged claims or developed arguments relating to anti-competitive gerrymandering in that case. Nevertheless, the circuit court concluded that *Johnson I* bars WBLD's anti-competitive gerrymandering claims. (App. 15 ("The panel must … follow binding precedent and dismiss Plaintiffs' claims as non-justiciable political questions.")) To the extent the circuit court applied *Johnson I*'s non-justiciability holding to bar as non-justiciable the novel claims here that were not before the Court in *Johnson I*, it read the Court in *Johnson I* to have penned an "advisory opinion"—that is, "an interpretation of the law without binding effect." *State v. Field*, 118 Wis. 2d 269, 288, 347 N.W.2d 365 (1984).

And even if the circuit court were correct in its conclusion that WBLD's anti-competitive gerrymandering claims are "functionally equivalent" to partisan gerrymandering claims (which, as WBLD argues above, they are not), the advisory opinion rule would still apply to the circuit court's dismissal of WBLD's claims here. As Justice Dallet pointed out in her dissent in *Johnson I*, no partisan gerrymandering claim was before this Court in that case, so any purported holding in *Johnson I* as to whether such "[partisan

gerrymandering] claims are cognizable under the Wisconsin Constitution" was itself merely an advisory opinion. *Johnson I*, 2021 WI 87, ¶103 (Dallet, J., dissenting) ("Without an excessive partisan-gerrymandering claim before us, there is no reason for the majority to issue an advisory opinion about whether such claims are cognizable under the Wisconsin Constitution."); *id.*, ¶105 ("We have no claim of excessive partisan gerrymandering before us.").

III. The Court should grant the Petition to correct the circuit court's erroneous conclusion that it must dismiss WBLD's claims grounded in violations of Wis. Const. art. I, §§ 1 and 22 and art. III because this Court has "effectively foreclosed" all constitutional challenges to the congressional districts "by holding that Article IV contains 'the exclusive repository of state constitutional limits on redistricting.'"

The circuit court reasoned that it was bound to "dismiss Plaintiffs' claims for failure to state a cognizable constitutional cause of action" because, in its view, this Court in *Johnson I* interpreted Article IV of the Wisconsin Constitution to be "the exclusive repository of state constitutional limits on redistricting." (App. 17) That conclusion rests on a dramatic overreading of plurality portions of *Johnson I* and should be rejected on that basis alone. Regardless, it is incompatible with this Court's affirmation in *Clarke* that Article I of the Wisconsin Constitution can supply additional constraints on the Legislature's redistricting authority. While Article IV assigns the Legislature "the primary authority and responsibility to draw new legislative maps," the Judiciary has an independent obligation to "safeguard the constitutional rights of all Wisconsin voters." *Clarke*, 2023 WI 79, ¶65. These rights include, but are in no way limited to, "the basic requirements set out in Article IV." *Id*. Whatever the ultimate merits of WBLD's anti-competitive gerrymandering theory, this Court should grant review to correct the circuit

court's erroneous choice to consign Wisconsin's Declaration of Rights to irrelevance in the redistricting context.

If there were any confusion about how broadly to read the plurality portions of *Johnson I* in that decision's immediate aftermath, this Court dispelled it in *Clarke*. The *Clarke* petitioners presented this Court with five proposed claims: three distinct claims each asserting that Wisconsin's legislative districts were "unconstitutional extreme partisan gerrymander[]s"; one claim asserting that certain districts were unconstitutionally non-contiguous; and one claim asserting that the districts were created by a process that violated the separation of powers doctrine. *Clarke v. WEC*, 2023 WI 70, 409 Wis. 2d 372, 373, 995 N.W.2d 779. The partisan gerrymandering claims were rooted in Wisconsin's Declaration of Rights; the contiguity claim arose from Article IV; and the separation of powers claim from the principles inherent in the Wisconsin Constitution's division of legislative, executive, and judicial powers. (App. 266–67) To be sure, this Court granted leave to commence an original action only with respect to the *Clarke* petitioners' Article IV and separation of powers claims. 2023 WI 70, 409 Wis. 2d at 375. Yet, on two occasions, this Court emphasized that the *Clarke* petitioners' extreme partisan gerrymandering claims "raise[d] important and ***unresolved*** questions of statewide significance." *Id.* (emphasis added); *see also* 2023 WI 79, ¶7 ("Petitioners' extreme-partisan-gerrymandering claim presented an important and ***unresolved*** legal question." (emphasis added)). This Court's characterization of the *Clarke* petitioners' Article I claims as "unresolved" can mean only one thing: *Johnson I* did not foreclose redistricting claims arising under provisions of the Wisconsin Constitution ***other*** than Article IV. The circuit court's cramped reading of the state constitution would render this characterization nonsensical.

The circuit court recognized that its interpretation of *Johnson I* was in significant tension with how this Court described the partisan gerrymandering claims in *Clarke*. In a footnote, the circuit court explained that it would not "infer from" what it described as "cursory statement[s]" in *Clarke* that this Court "intended to overrule its detailed holding in *Johnson I*." (App. 14 n.7) But this justification ignores the significance of the statements in *Clarke*: by repeatedly describing petitioners' partisan gerrymandering claims as raising "unresolved" legal questions, the Court rejected the expansive view of *Johnson I*'s holding that the circuit court has now mistakenly embraced. There was no need for this Court to "overrule" *Johnson I* with respect to non-Article IV redistricting claims because, in this Court's view, *Johnson I* did not resolve the question of whether non-Article IV redistricting claims were actionable. The dissenters in *Clarke* certainly recognized the significance of the Court's careful choice of words: they argued strenuously that *Johnson I* had indeed settled this question. *See* 2023 WI 79, ¶112 (Ziegler, C.J., dissenting) ("[T]his court answered the question of partisan gerrymandering in *Johnson I* … ."); *id.*, ¶276, n.3 (Hagedorn, J., dissenting) ("The majority also says that the petitioners' partisan gerrymandering claim is an 'unresolved legal question.' Majority op., ¶7. It is not."). These arguments, however persuasive the circuit court found them, failed to carry the day in *Clarke*, and the circuit court had no authority to embrace them. Instead, as the circuit court rightly noted, a lower court panel is "not … at liberty to disregard th[is] Court's statements as 'dicta' or an 'opinion.'" (App. 15) (quoting *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682))

The prospective consequences of leaving the circuit court's characterization of Article I redistricting claims undisturbed are likely to be

far-reaching and warrant appellate review. Whether or not WBLD succeed in showing that the Wisconsin Constitution prohibits anti-competitive gerrymandering in this case, there will almost certainly be future challenges to legislative redistricting. The circuit court's decision creates significant confusion regarding an important threshold legal question: whether provisions of the Wisconsin Constitution ***other*** than Article IV provide judicially enforceable limits on legislative redistricting. A decision by this Court now, in advance of the next redistricting cycle, will help "clarify [and] harmonize … a question of law of the type that is likely to recur unless resolved by the supreme court." Wis. Stat. § 809.62(1r)(c)(3).

IV. Because the U.S. Supreme Court has foreclosed adjudication of partisan gerrymandering claims in federal courts, if this Court allows the circuit court's conclusion to stand, Wisconsin voters will be deprived of any legal remedy for the intentional drawing of districts to stifle competitive elections.

"The Wisconsin Constitution contains … a guarantee of 'a certain remedy in the law for all injuries, or wrongs.'" *Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶106, 407 Wis. 2d 87, 990 N.W.2d 122 (Dallet, J., concurring) (quoting Wis. Const. art. I, § 9). While Article I, Section 9 does not require "a remedy that must be accompanied by a certainty of recovery," it does "guarantee[] to every litigant a day in a court of competent jurisdiction to present claims for judicial relief." *State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶92, 374 Wis. 2d 26, 892 N.W.2d 267. Here, the circuit court's overly expansive application of the political question doctrine—in the shadow of the U.S. Supreme Court's decision to foreclose adjudication of partisan gerrymandering claims in federal court in *Rucho*, 588 U.S. at 718—functionally deprives Wisconsin voters of any judicial forum in which to vindicate state constitutional rights.

To be sure, the circuit court's conflation of WBLD's anti-competitive gerrymandering claims with the partisan gerrymandering claims raised in *Johnson I* is reversible error in its own right. *See supra* Part II.A. So, too, is the circuit court's disregard for *Clarke*'s recognition of the potential viability of Article I redistricting claims. *See supra* 28–29. Yet in refusing even to entertain WBLD's anti-competitive gerrymandering claims, the circuit court eschewed this Court's admonition that "[i]t is the responsibility of the judiciary to act, notwithstanding the fact that [a] case involves political considerations or that final judgment may have practical political consequences." *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 436–37, 424 N.W.2d 385 (1988).

In *Rucho*, the U.S. Supreme Court held that a partisan gerrymandering claim arising under the federal constitution was a nonjusticiable political question because it asked a question "'entrusted to one of the political branches or involv[ing] no judicially enforceable rights.'" 588 U.S. at 696 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality op.)). A plurality of this Court followed suit in *Johnson I*, relying solely on *Rucho* and its federal court predecessors in concluding that "[w]hether a map is 'fair' to the two major political parties is quintessentially a political question." 2021 WI 87, ¶40, *overruled by Clarke*, 2023 WI 79, ¶40. Based on *Johnson I*, the circuit court deemed WBLD's claims to be "non-justiciable political questions." (App. 15) This conclusion is predicated on two interrelated legal errors. Each in its own right warrants review.

First, even if partisan and anti-competitive gerrymandering claims were analogous (and they are not), the circuit court erred in mirroring the *Johnson I* plurality's non-justiciability reasoning, which rested entirely on ***federal*** caselaw rather than ***state*** constitutional principles. As a legal

matter, nothing in *Rucho* compels state courts to adhere to the U.S. Supreme Court's holding that partisan gerrymandering claims are non-justiciable: *Rucho* itself recognized the possibility of state-court adjudication of the exact same kinds of claims it deemed beyond the purview of the ***federal*** courts. *See* 588 U.S. at 719 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."). While "[f]ederal jurisprudence" can be "persuasive and helpful" in resolving similar questions arising under state law, "this [C]ourt must make an independent judgment considering competing principles and policies under the Wisconsin Constitution." *State v. Luedtke*, 2015 WI 42, ¶87, 362 Wis. 2d 1, 863 N.W.2d 592 (Abrahamson, C.J., concurring); *accord In re Adoption of M.M.C.*, 2024 WI 18, ¶¶52–53, 411 Wis. 2d 389, 5 N.W.3d 238 (Dallet, J., concurring) ("[W]e have a long history of interpreting our constitution to provide greater protections for the individual liberties of Wisconsinites than those mandated by the federal Constitution. … [O]ur constitution … is meaningfully different than the federal Constitution."); *State v. Knapp*, 2005 WI 127, ¶59, 285 Wis. 86, 700 N.W.2d 889 ("'[I]t is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court. ...'" (internal citation omitted)); *id.*, ¶92 (Crooks, J., concurring) ("In refusing to apply mechanically decisions based on federal law to rights guaranteed by our state constitution, the court continues to place Wisconsin in good company with the many states which have embraced 'new federalism.'").

There is good reason for state courts to avoid reflexively applying federal non-justiciability principles: because "[t]he 'judicial power' conferred in state constitutions and exercised by state courts is markedly different from

what federal courts are permitted to exercise under Article III … the arguments that are so often asserted as the bases for federal justiciability doctrine just do not apply to state courts." Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 Rutgers U.L. Rev. 1309, 1323 (2017). That is certainly the case in Wisconsin, where "the doctrine of political question nonjusticiability is rarely invoked." *Vincent v. Voight*, 2000 WI 93, ¶194, 236 Wis. 2d 588, 614 N.W.2d 388 (Sykes, J., concurring). It is the Wisconsin Judiciary's function to "develop and clarify the law," and "it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is." *Thompson*, 144 Wis. 2d at 436. Courts "may not avoid this duty simply because one or both parties are coordinate branches of government." *Id.*; *see also Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384 ("By vesting the judicial power in a unified court system, the Wisconsin Constitution entrusts the judiciary with the duty of interpreting and applying laws made and enforced by coordinate branches of state government."). The circuit court's disavowal of its obligation to interpret the law is particularly harmful in this context because, as this Court has explained, refusing to adjudicate constitutional challenges to election laws perpetuates "the fallacy of withdrawing affirmative judicial protection from voting rights [which] lies in the self-perpetuating nature of the disenfranchisement." *Zimmerman*, 22 Wis. 2d at 563.

Second, the circuit court erred in categorically rejecting WBLD's claims—based on its mistaken view that this Court has forbidden redistricting challenges predicated on anything other than Article IV—without engaging WBLD's specific legal theories and factual allegations. Even under the federal approach the *Johnson* plurality (and the circuit court

here) followed, application of the political question doctrine is necessarily claim-specific: a court must analyze the legal and factual underpinnings of a claim to determine whether there is some 'judicially discoverable and manageable standards' by which to judge" it. *Johnson I*, 2021 WI 87, ¶40 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Thus, the non-justiciability holding in *Rucho* required a record developed through adversarial litigation, one that enabled courts to assess whether any of the "propose[d] … 'tests' for evaluating partisan gerrymandering claims … meet[] the need for a limited and precise standard that is judicially discernible and manageable." 588 U.S. at 710.

Here, by contrast, the circuit court relied solely on sweeping assumptions and its faulty reference to partisan gerrymandering claims raised in prior cases. For example, the circuit court baldly asserted that "the competitiveness of a district is difficult to ascertain due to the fluctuating nature of political identity and the lack of party registration" (App. 14)—ignoring WBLD's allegations that competitiveness is indeed measurable (*see, e.g.*, App. 89–90, ¶78) and denying them the opportunity to prove those at trial. Similarly, the circuit court rested on the conclusory assertion that "the competitiveness of a map poses the same type of 'subjective question with no governing standards' as the fairness of a map" (App. 14)—without even a cursory examination of the actual test WBLD proposed (*see, e.g.*, App. 90, ¶79), which is distinct from tests for partisan fairness proposed in prior litigation. Together, the circuit court's reflexive application of essentially federal non-justiciability principles, combined with its refusal to carefully scrutinize WBLD's legal theory and factual allegations, functionally deprives Wisconsin voters harmed by unconstitutional legislative districts of any possibility of a remedy. Article I, Section 9 does not preclude considered

application of non-justiciability principles, but it did require the circuit court to meaningfully engage WBLD's claims before permanently shutting the courthouse doors.

Conclusion

For the reasons stated above, this Court should grant this Petition for Review.

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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 7,976 words.

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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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